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No. 06-1057

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SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

CORUS STAAL BV,
Petitioner,

v.

UNITED STATES OF AMERICA
AND UNITED STATES STEEL CORPORATION,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

REPLY BRIEF OF PETITIONER

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RULE 29.6 STATEMENT

Corus Staal BV is 100% owned by Corus Investment BV, which is 100% owned by Corus Nederland BV (formerly Koninklijke Hoogovens NV), which is 100% owned by Corus Group plc, which, effective April 2, 2007, is 100% owned by Tata Steel U.K. Limited, which is in turn 100% owned by Tata Steel Limited, a publicly owned and traded company listed on the Mumbai Stock Exchange, the National Stock Exchange of India, and the Calcutta Stock Exchange (an application for delisting pending before the latter exchange). Two companies exist which own 10% or more of Tata Steel Limited's outstanding stock: Tata Sons Limited and Life Insurance Corporation of India.

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REPLY BRIEF OF PETITIONER

The opposition briefs of the United States and of United States Steel Corporation ("U.S. Steel") are premised on a fundamental misinterpretation of the statutory scheme carefully crafted by Congress to govern implementation by the United States of rulings issued by the Dispute Settlement Body ("DSB") of the World Trade Organization ("WTO").[1] That misinterpretation is at the core of this case and, if not corrected by this Court, will have pernicious consequences of the highest importance. It will

- continue the divergence between the Court of Appeals for the Federal Circuit ("Federal Circuit") (whose decision is here at issue) and the Court of Appeals for the District of Columbia Circuit on the rule enunciated by this Court in *NLRB v. Food Store Employees Union, Local 347*, 417 U.S. 1 (1974), that a reviewing court must remand following an intervening change in agency policy, for the agency to determine whether and how that change in policy will apply to the administrative decision undergoing judicial review;
- permit the Department of Commerce ("Commerce") to limit its implementation of WTO decisions in a manner directly contrary to U.S. law and to the expressed will of Congress; and
- give rise to continuing violation by the United States of its obligations under the WTO agreements relating to duties imposed under the antidumping and countervailing duty laws, with resultant conflict between the United States and its trading partners and potential authorization by the DSB of retaliation by those trading partners against the United States.

Specifically, the issue here is whether Commerce, in a review that depends entirely for its authority on the existence of a valid final determination of dumping, should be required

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[1] Petitioner notes that on June 6, 2007 a petition for writ of certiorari presenting the same questions at issue herein was filed with the Court, styled *JTEKT Corporation, et. al. v. United States of America*, Petition For Writ of Certiorari (June 6, 2007).

to consider the effect on that review of a change in antidumping computation policy adopted by Commerce during the pendency of this appeal, where the effect of that change is to invalidate that final determination of dumping.

The issue raised by this petition is not, as the United States and U.S. Steel repeatedly mischaracterize it, whether the new policy enunciated by Commerce in its Section 123 determination[2] requires that a non-zeroed method of computation be used in the administrative review here on appeal.[3] Rather, petitioner contends that Commerce's new policy, by invalidating the affirmative final determination of dumping in this proceeding, deprives Commerce of the authority to impose antidumping duties on the basis of any computation, whether zeroed or not.

Neither the United States nor U.S. Steel contests the principle that an antidumping review may not be conducted, nor may antidumping duties be levied, in the absence of a valid affirmative determination of dumping. Nor does the United States or U.S. Steel contest the fact that Commerce's intervening change in policy (abandoning "zeroing" in the average-to-average computation of the weighted dumping margin), as applied to the investigation of dumping in this proceeding, invalidates the affirmative determination of dumping in this Dutch steel antidumping proceeding. In fact, Commerce has applied this change in policy to the Dutch Steel antidumping proceeding, has recalculated the weighted average dumping margin without zeroing, and has determined that petitioner was not dumping and that the affirmative antidumping determination reached in 2001 is therefore not

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[2] *Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation; Final Modification*, 71 Fed. Reg. 77,722 (Dep't of Commerce, Dec. 27, 2006) (Petition App. 114a-128a).

[3] Petitioner does in fact believe that, for reasons other than the issues raised in this petition, a non-zeroed calculation should have been used.

valid.[4] On that basis, Commerce has revoked the antidumping duty order in this proceeding.[5]

While the United States and U.S. Steel maintain that the final antidumping determination in this proceeding was validly computed and validly issued in 2001, they do not contest that as of today that final antidumping determination is not valid. In fact, on that basis, Commerce determined in the fourth administrative review in this proceeding that instructions would not be issued to U.S. Customs and Border Protection requiring that it collect antidumping cash deposits in connection with petitioner's imports.[6]

Even though all of the foregoing is undisputed, and even though the new policy propounded by Commerce in its Section 123 determination has in fact been applied to the affirmative final determination of dumping in this proceeding and has invalidated that determination, the United States and U.S. Steel argue that there is no issue that Commerce can consider as to the application of its new policy, which was adopted under Section 123, to the administrative review here on appeal. Their basis for this contention is that determinations made under another WTO implementation provision, established under Section 129 of the Uruguay Round Agreements Act ("URAA"),[7] are to be applied "prospectively," and "prospectively" is defined differently for purposes of Section 129 than the normal definition of that term in the decisional

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[4] *Implementation of the Findings of the WTO Panel in US-Zeroing (EC): Notice of Determinations Under Section 129 of the Uruguay Round Agreements Act and Revocations and Partial Revocations of Certain Antidumping Duty Orders*, 72 Fed. Reg. 25,261, 25,262 (Dep't of Commerce, May 4, 2007) (Reply App. 5a).

[5] *Id.*

[6] *Certain Hot-Rolled Carbon Steel Flat Products from the Netherlands; Final Results of Antidumping Duty Administrative Review*, 72 Fed. Reg. 28,676, 28,677 (Dep't of Commerce May 22, 2007) (Reply App. 62a).

[7] 19 U.S.C. § 3538(c)(1).

law governing policies propounded with respect to antidumping proceedings. Specifically, the United States and U.S. Steel point to the wording of Section 129 and to the discussion of Section 129 in the Statement of Administrative Action ("SAA") accompanying the URAA to support the proposition that if the United States Trade Representative ("USTR") requests that Commerce issue a new determination and orders Commerce to implement it under Section 129, that new determination applies only to "unliquidated entries of the subject merchandise" that are entered or withdrawn from warehouse for consumption on or after the date USTR directs Commerce to implement the new decision. 19 U.S.C. § 3538(c)(1).[8]

An administrative review deals with imports that were entered for consumption during the 12 months preceding the commencement of the review. Therefore, the imports covered by the final determining in the review here under appeal necessarily were entered for consumption prior to the date of the Section 129 implementation and were not covered by the Section 129 determination. Such "prior unliquidated entries" are, according to the SAA, simply not addressed by the action taken under Section 129, whether it be a change in computational methodology or a revocation of the antidumping order.[9]

But all of this is irrelevant to the issue raised by this petition, which relates to the absence of authority to impose antidumping duties that has been created by the Section 123 promulgation of a new policy that invalidates the affirmative determination of dumping. Petitioner does not contend that the Section 129 determination should have ordered the termination or rescission of this administrative review, or that it should have forbidden the issuance of antidumping duty liquidation instructions. The Section 129 determination had

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[8] Brief for the United States in Opposition at 6-7.

[9] Uruguay Round Statement of Administrative Action at 1026, H.R. Doc. No. 103-316 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040, 4313.

nothing to do with such decisions as to the prior unliquidated entries covered by this review. Those issues are to be decided in the review, applying the law now in existence, including the policy established in the Section 123 determination and the consequences of that policy under the decisional law governing application of newly-enunciated policies. It is precisely for that purpose that this review must be remanded to Commerce.

This petition argues that a remand is necessary to enable Commerce, in the annual review that addresses prior unliquidated imports that entered during the review period, to decide whether and how to apply to those entries the effects of the change in policy enunciated in Commerce's Section 123 determination. It cannot be argued in opposition, as the United States and U.S. Steel appear to contend, that this issue (or any other question relating to prior unliquidated entries) is addressed in the Section 129 process. Commerce itself made this clear in its "Issues and Decision Memorandum for the Final Results of the Section 129 Determination":

> Apart from confirming that the effect of the section 129 determinations will be prospective only, meaning that they will apply with respect to unliquidated entries made on or after the date on which USTR directs the Department to implement these determinations, the Department is taking no further position in these determinations. Because the treatment of any unliquidated entries made prior to the effective date of these determinations will not be governed by these determinations, such entries will be addressed through separate segments of these proceedings, as appropriate.[10]

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[10] *Final Results for the Section 129 Determinations*, Issues and Decision Memorandum at 17 (Dep't of Commerce Apr. 9, 2007), *available at*, http://ia.ita.doc.gov/download/zeroing/zeroing-sec-129-final-decision-memo-20070410.pdf (emphasis added) (Reply App. 41a). This position is identical to that represented by the United States to a WTO panel in defending Section 129 against a Canadian challenge that argued that Section 129 requires the United States to act in a WTO-inconsistent manner if it re-

Commerce reiterated this principle in connection with its final determination in the fourth administrative review of the Dutch Steel antidumping proceeding. In discussing whether the limitation of a Section 129 determination to future entries is dispositive of whether the Section 129 revocation of an order does or does not address whether antidumping duties can be assessed on prior unliquidated entries, Commerce explicitly recognized that it does not.

> Section 129 of the URAA is clear that any implemented determination resulting from such a proceeding is effective with respect to unliquidated entries that enter or are withdrawn from warehouse on or after the date that USTR directs the Department to implement the determination. That provision does not speak to the effect of a revocation pursuant to Section 129 on prior unliquidated entries; however, the SAA makes clear that such entries remain subject to potential duty liability. SAA at 1026.[11]

Equally significant is the SAA statement referred to by Commerce, that after a Section 129 order revocation, prior unliquidated entries "would remain subject to potential duty liability."[12] Obviously, if Congress had wanted to make clear that, after a Section 129 order revocation, antidumping duties would be assessed on prior unliquidated entries, it would have

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quires Commerce to impose antidumping duties after revocation of an antidumping order. Second Written Submission of the United States, *United States - Section 129(c)(1) of the Uruguay Round Agreements Act*, WT/DS/221 (Mar. 8, 2002) ("Commerce would need to decide what to do with respect to entries that took place prior to the date of revocation . . . . Section 129(c)(1) . . . does not limit Commerce's discretion in deciding how to administer the law in separate segments of the proceeding with respect to those entries . . . ." *Id.* ¶¶ 19, 20 (Petition App. 139a-140a)).

[11] *Certain Hot-Rolled Carbon Steel Flat Products from the Netherlands; Final Results of Antidumping Duty Administrative Review*, 72 Fed. Reg. 28,676, Issues and Decision Memorandum at 14 (Dep't of Commerce May 15, 2007) (emphasis added), *available at*, http://ia.ita.doc.gov/frn/summary/netherlands/ E7-9815-1.pdf (Reply App. 86a-87a).

[12] SAA at 1026 (emphasis added).

said exactly that. Instead, the insertion of the word "potential" can only be read to mean that whether such imports would be subject to antidumping duties would depend on determinations to be made in reviews, wholly apart from the Section 129 determination.

The fact is that the Section 129 determination did not address, much less dispose of, the question whether application of Commerce's new policy enunciated in the Section 123 determination has removed the authority for this review and for Commerce's order to liquidate antidumping duties.

In its final determination in the Section 123 proceeding, Commerce candidly and correctly stated the difference in applicability of Section 123 and Section 129 determinations:

> The SAA states that section 129 determinations will apply only with respect to entries occurring on or after the effective date. However, the SAA makes no such statement with respect to Section 123 modifications.[13]

This distinction is consistent with the different functions of the two implementation proceedings. Proceedings under Section 129 have the limited function of determining whether to modify a single discrete action taken by Commerce or the International Trade Commission. Given this narrow function, Congress reasonably determined to limit the applicability of the modification to future entries. Section 123, in contrast, effects a generalized change in U.S. law or agency policy and is not limited to a single agency decision or even a single proceeding. It is therefore logical that Congress did not create a special limitation of applicability to future import entries, but rather left Section 123 changes in law or agency policy to be governed by the normal rules of applicability.

The normal rules governing the applicability of a new policy announced by an administrative agency make it clear

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[13] *Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation; Final Modification*, 71 Fed. Reg. 77,722, 77,725 (Dep't of Commerce, Dec. 27, 2006) (Petition App. 125a-126a).

that such a new policy is to be applied to acts done by or decisions made by the agency after the promulgation of the new rule. With respect to new agency policies promulgated under the antidumping and countervailing duty laws, the rule is that such a new policy is to be applied to imports liquidated after the effective date of the new policy, without regard to the date on which the imports were entered for consumption.

In confirming that date of liquidation, not date of entry, is the touchstone for distinguishing between "prospectivity" and "restrospectivity" under the antidumping law, the Federal Circuit in *Parkdale Int'l v. United States*, 475 F.3d 1375 (Fed. Cir. 2007), emphasized the importance of applying newly-enunciated agency policies to ensure accurate calculation of antidumping margins:

> [A]n overriding purpose of Commerce's administration of antidumping laws is to calculate dumping margins as accurately as possible, and this requires altering dumping rates to reflect changes in, inter alia, policy or commercial realities.[14]

This rationale has particular force in the present context, where failure to apply Commerce's new policy would permit assessment of duties at a time when no valid authority exists for such assessments. Indeed, Commerce itself has applied this test of retrospectivity to the scope of application of a new policy enunciated in a Section 123 proceeding.[15]

It is clear, therefore, that a central issue that must be decided in the review here under appeal has been created by

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[14] 475 F.3d at 1380, *citing Rhone Poulenc, Inc. v. United States*, 899 F.2d 1185, 1191 (Fed. Cir. 1990). This Court has held that a law or agency policy does not operate retrospectively merely because it is applied to past conduct, unless it "attaches new legal consequences" to the past conduct. *Landgraf v. USI Film Prods.*, 511 U.S. 244, 269-70 (1994).

[15] *Final Determination of Sales at Less Than Fair Value: Certain Activated Carbon from the People's Republic of China*, 72 Fed. Reg. 9508, Issues and Decision Memorandum at Cmt. 4 (Dep't of Commerce Feb. 23, 2007), *available at*, http://ia.ita. doc.gov/frn/summary/PRC/E7-3693-1.pdf.

the new policy adopted by Commerce during the pendency of this appeal. It is equally clear that applicability of this new policy to the issue of Commerce's continuing authority to impose antidumping duties in this review was not addressed, much less decided, in Commerce's Section 129 determination. It is also clear that the effects of a Section 123 change in agency policy are not limited in application to future import entries, but are instead applicable to any Commerce determination to impose or liquidate antidumping duties after the effective date of the Section 123 determination (here, February 22, 2007). It is therefore imperative that this Court grant certiorari to consider a remand to Commerce to determine, in the first instance, whether and how to apply its new policy to the appealed review.

Finally, it is simply wrong for the United States to contend that Commerce has resolved, in its final determination of the fourth administrative review of the Dutch steel antidumping proceeding, the issue of whether and how the new policy promulgated in its Section 123 determination affects the authority to impose antidumping duties in that review. Nothing in Commerce's final determination in that review[16] remotely suggests that any consideration was given to the effect of the Section 123 change in policy. Rather, Commerce's stated reason for determining that assessment of antidumping duties continues to be appropriate related entirely to the irrelevant question whether the Section 129 determination deprives Commerce of authority to impose duties:

- ". . . the Department notes that Section 129 of the URAA is clear that any implemented determination" is not effective as to prior unliquidated entries.[17]

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[16] *See Certain Hot-Rolled Carbon Steel Flat Products from the Netherlands; Final Results of Antidumping Duty Administrative Review*, Issues and Decision Memorandum at 12-14 (Dep't of Commerce May 15, 2007), *available at*, http://ia.ita.doc.gov/frn/summary/netherlands/E7-9815-1.pdf (Reply App. 84a-87a).

[17] *Id.* at 14 (Reply App. 86a).

- "That provision does not speak to the effect of a revocation pursuant to Section 129 on prior unliquidated entries; however, the SAA makes clear [in its discussion of Section 129] that such entries remain subject to potential duty liability. SAA at 1026."[18]
- "The combination of clear statutory language regarding prospective implementation, and the SAA language noting that prior entries may be subject to potential duty liability . . . ."[19] These are references to Section 129, not to Section 123.

But even if it could be argued that Commerce has made a decision in another proceeding on the issue posed by this petition—whether the change in policy that invalidated the final antidumping determination deprives Commerce of authority to impose duties in this review—petitioner has the right to challenge that decision in this review. That alone requires a remand to the agency. This is especially important where the legal defect in Commerce's decision on that point is so obvious: after promulgating a new policy, Commerce, instead of basing its decision on whether the effect of that policy should be applied to prior unliquidated entries, has simply stated that "the Department considers that the Appellate Body report represents a substantial departure from the understanding of the Antidumping Agreement at the time it was concluded. For these reasons, the Department declines to consider giving any broader retrospective effect to the revocation of the order."[20] An administrative agency that has promulgated a new rule or policy is not free to say "we don't like our own new policy and we decline to apply it."

CONCLUSION

For the foregoing reasons and those stated in the petition, this Court should grant this petition for a writ of certiorari.

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[18] *Id.* (Reply App. 86a-87a).

[19] *Id.* (Reply App. 87a).

[20] *Id.*

Respectfully submitted,

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June 8, 2007

APPENDIX

APPENDIX A

FEDERAL REGISTER

Vol. 72, No. 086

Notices

DEPARTMENT OF COMMERCE (DOC)

International Trade Administration (ITA)

Import Administration

Implementation of the Findings of the WTO Panel in US—Zeroing (EC): Notice of Determinations Under Section 129 of the Uruguay Round Agreements Act and Revocations and Partial Revocations of Certain Antidumping Duty Orders

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72 FR 25261

DATE: Friday, May 4, 2007

SUMMARY: On April 23, 2007, the U.S. Trade Representative instructed the Department of Commerce (the Department) to implement its findings under section 129 of the Uruguay Round Agreements Act (URAA) regarding the offsetting of dumped sales with non-dumped sales in investigations involving average-to-average transactions. The Department issued its findings on April 9, 2007, regarding eleven investigations challenged by the European Communities before the World Trade Organization. The Department is now implementing those findings.

DATES: The effective date of these determinations is April 23, 2007.

FOR FURTHER INFORMATION CONTACT: Daniel O'Brien, William Kovatch, or Michael Rill, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Ave., NW.,

Washington, DC 20230; telephone: (202) 482-1376, (202) 482-5052, or (202) 482-3058, respectively.

SUPPLEMENTARY INFORMATION: On February 22, 2007, the Department initiated twelve proceedings under section 129 of the URAA to implement the WTO dispute settlement panel's report in United States—Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing") (WT/DS294). In each proceeding, the Department recalculated the weighted-average dumping margin from the following antidumping investigations, applying the calculation methodology described in *Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation; Final Modification; see* 71 FR 77722 (December 27, 2006):

1. Certain Hot-Rolled Carbon Steel from the Netherlands (A-421-807).
2. Stainless Steel Bar From France (A-427-820).
3. Stainless Steel Bar From Germany (A-428-830).
4. Stainless Steel Bar From Italy (A-475-829).
5. Stainless Steel Bar From the United Kingdom (A-412-822).
6. Stainless Steel Wire Rod From Sweden (A-401-806).
7. Stainless Steel Wire Rod From Spain (A-469-807).
8. Stainless Steel Wire Rod From Italy (A-475-820).
9. Certain Stainless Steel Plate in Coils from Belgium (A-423-808).
10. Stainless Steel Sheet and Strip in Coils from Italy (A-475-824).
11. Certain Cut-to-Length Carbon-quality Steel Plate From Italy (A-475-826).

12. Certain Pasta From Italy (A-475-818).

On February 26, 2007, the Department issued its preliminary results and requested comments. After receiving comments and rebuttal comments from the interested parties, the Department issued its Final Results for the Section 129 Determinations in eleven of the twelve proceedings on April 9, 2007.[1]

On April 20, 2007, consistent with section 129(b)(3) of the URAA, the U.S. Trade Representative held consultations with the Department and the appropriate congressional committees with respect to these determinations. On April 23, 2007, in accordance with sections 129(b)(4) and 129(c)(1)(B) of the URAA, the U.S. Trade Representative directed the Department to implement these determinations.

Nature of the Proceedings

Section 129 of the URAA governs the nature and effect of determinations issued by the Department to implement findings by WTO dispute settlement panels and the Appellate Body. Specifically, section 129(b)(2) provides that "notwithstanding any provision of the Tariff Act of 1930," within 180 days of a written request from the U.S. Trade Representative, the Department shall issue a determination that would render its actions not inconsistent with an adverse finding of a WTO panel or the Appellate Body. See 19 U.S.C. 3538(b)(2). The Statement of Administrative Action, U.R.A.A., H. Doc. 316, Vol. 1, 103d Cong. (1994) (SAA), variously refers to such a determination by the Department as a "new," "second," and

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[1] With respect to Stainless Steel Sheet and Strip in Coils from Italy (A-475-824), one interested party made allegations of computational errors in calculating the weighted-average dumping margin. The Department found that there was a reasonable basis to investigate the allegations further, and postponed its decision in that proceeding in order to place additional information on the administrative record, and allow interested parties additional time to comment.

"different" determination. See SAA at 1025, 1027. After consulting with the Department and the appropriate congressional committees, the U.S. Trade Representative may direct the Department to implement, in whole or in part, the new determination made under section 129. See 19 U.S.C. 3538(b)(4). Pursuant to section 129(c), the new determination shall apply with respect to unliquidated entries of the subject merchandise that are entered, or withdrawn from warehouse, for consumption on or after the date on which the U.S. Trade Representative directs the Department to implement the new determination. See 19 U.S.C. 3538(c). The new determination is subject to judicial review separate and apart from judicial review of the Department's original determination. See 19 U.S.C. 1516a (a) (2) (B) (vii).

Analysis of Comments Received

The issues raised in the case and rebuttal briefs submitted by interested parties to these proceedings are addressed in the Issues and Decision Memorandum for the Final Results of the Section 129 Determinations, from Stephen J. Claeys to David M. Spooner, dated April 9, 2007 (Issues and Decision Memorandum), which is hereby adopted by this notice. The Issues and Decisions Memorandum is on file in the Central Records Unit (CRU), room B-099 of the Department of Commerce main building and can be accessed directly at *http://ia.ita.doc.gov/frn*. The paper copy and electronic version of the Issues and Decisions Memorandum are identical in content. A list of the issues addressed in the Issues and Decisions Memorandum is appended to this notice.

Final Antidumping Margins

The recalculated margins, unchanged from the Preliminary Results for all cases, except the investigation of Stainless Steel Sheet and Strip in Coils from Italy, are as follows:

(1) Certain Hot-Rolled Carbon Steel From the Netherlands

- The margin for Corus, the sole respondent, decreases from 2.59 percent to zero. Since Corus was the only respondent in the investigation, we are now revoking this order effective April 23, 2007 (the effective date).

(2) Stainless Steel Bar From France

- The margin for UGITECH decreases from 3.9 percent to zero. We are now revoking this order for UGITECH effective April 23, 2007 (the effective date).
- The margin for Aubert and Duval S.A. was based on total AFA. This margin does not change as a result of this proceeding.
- Since there are no non-AFA, above *de minimis* margins remaining, pursuant to Department practice, the all others rate is based on a simple average of the zero margins and the AFA margins. Therefore, the all-others rate changes from 3.9 percent to 35.92 percent.

(3) Stainless Steel Bar From Germany

- The margin for BGH decreases from 13.63 percent to 2.59 percent.
- The margin for Einsal decreases from 4.17 percent to *de minimis*. We are now revoking this order for Einsal effective April 23, 2007 (the effective date).
- The margin for Edelstahl Witten-Krefeld GmbH decreases from 15.40 percent to 10.82 percent.

- The margin for Krupp Edelstahlprofile GmbH decreases from 32.32 percent to 31.25 percent.
- The all-others rate changes from 16.96 percent to 15.16 percent.

(4) Stainless Steel Bar From Italy

- The margin for Acciaiera Valbruna S.p.A. decreases from 2.50 percent to zero. We are now revoking this order for Acciaiera Valbruna S.p.A. effective April 23, 2007 (the effective date).
- The margin for Acciaiera Foroni S.p.A. decreases from 7.07 percent to zero. We are now revoking this order for Acciaiera Foroni S.p.A. effective April 23, 2007 (the effective date).
- Trafilerie Bedini S.r.l. was excluded from the order and that does not change as a result of this proceeding.
- The margin for Cogne Acciai Speciali Srl was based on total AFA. This margin does not change as a result of this proceeding.
- The margin for Rodacciai S.p.A. decreases from 3.83 percent to zero. We are now revoking this order for Rodacciai S.p.A. effective April 23, 2007 (the effective date).
- Since there are no non-AFA above *de minimis* margins remaining, pursuant to Department practice, the all-others rate is based on a simple average of the zero margins and the AFA margins. Therefore, the all-others rate changes from 3.81 percent to 6.60 percent.

(5) Stainless Steel Bar From the United Kingdom

- The margin for Corus Engineering Steels Ltd. decreases from 4.48 percent to zero. We are now revoking this order for Corus Engineering Steels Ltd. effective April 23, 2007 (the effective date).

- Firth Rixon Special Steels Ltd. and Crownridge Stainless Steel Ltd.'s/Valkia Ltd.'s margins were based on total AFA. These margins do not change as a result of this proceeding.
- Since there are no non-AFA above *de minimis* margins remaining, pursuant to Department practice, the all-others rate is based on a simple average of the zero margins and the AFA margins. Therefore, the all-others rate changes from 4.48 percent to 83.85 percent.

(6) Stainless Steel Wire Rod From Sweden

- The margin for Fagersta Stainless AB decreases from 5.71 percent to zero. Since Fagersta Stainless AB was the only respondent in the investigation, we are now revoking this order effective April 23, 2007 (the effective date).

(7) Stainless Steel Wire Rod From Spain

- The margin for Roldan S.A., the sole respondent, decreases from 4.76 percent to 2.71 percent.
- The all-others rate changes from 4.76 percent to 2.71 percent.

(8) Stainless Steel Wire Rod From Italy

- The margin for Cogne Acciai Speciali S.r.l. decreases from 12.73 percent to 11.25 percent.
- Acciaiera Valbruna S.p.A. was excluded from the order and that does not change as a result of this proceeding.
- The all-others rate changes from 12.73 percent to 11.25 percent.

(9) Stainless Steel Plate in Coils From Belgium

- The margin for Ugine & ALZ Belgium (formerly ALZ N.V.), the sole respondent, decreases from 9.84 percent to 8.54 percent.
- The all-others rate changes from 9.84 percent to 8.54 percent.

(10) Certain Cut-To-Length Carbon-Quality Steel Plate Products From Italy

- The margin for Palini and Bertoli S.p.A. decreases from 7.85 percent to 7.64 percent.
- ILVA S.p.A. was excluded from the order and that does not change as a result of this proceeding.
- The all-others rate changes from 7.85 percent to 7.64 percent.

(11) Certain Pasta From Italy

- The margin for Arrighi S.p.A. Industrie Alimentari decreases from 21.34 percent to 20.84 percent.
- The margin for Liguori Pastificio Dal 1820 S.p.A. decreases from 12.41 percent to 12.14 percent.
- The margin for Pastificio Fratelli Pagani S.p.A. decreases from 18.30 percent to 18.23 percent.
- The margin for La Molisana Industrie Alimentari S.p.A. remains at 14.78 percent based on this recalculation.
- De Matteis Agroalimentare S.p.A. and Delverde S.r.l. were excluded from the order and that does not change as a result of this proceeding.
- F.lli De Cecco de Filippo Fara San Martino S.p.A.'s margin was based on total AFA. This margin does not change as a result of this proceeding.

- The all-others rate changes from 12.09 percent to 16.51 percent. We note that Delverde S.r.l.'s margin in the investigation was a component of the all-others rate. However, since Delverde S.r.l. was later revoked from the order as a result of litigation relating to the investigation, its margin is no longer a component of the all others rate. We note also that, for cash deposit purposes, we deduct from the margin of dumping any export subsidies. On that basis, the new cash deposit rate that will be established for all others is 15.45 percent.

Revocations, Cash Deposits and Continuation of the Suspension of Liquidation

On April 23, 2007, in accordance with sections 129(b)(4) and 129(c)(1)(B) of the URAA, the U.S. Trade Representative, after consulting with the Department and Congress, directed the Department to implement these determinations.

With respect to Certain Hot-Rolled Carbon Steel from the Netherlands and Stainless Steel Wire Rod from Sweden, we will instruct U.S. Customs and Border Protection (CBP) to liquidate without regard to antidumping duties entries of the subject merchandise entered, or withdrawn from warehouse, for consumption on or after April 23, 2007, (the effective date), and to discontinue collection of cash deposits of antidumping duties.

With respect to Stainless Steel Bar from France, we will instruct CBP to liquidate without regard to antidumping duties entries of the subject merchandise manufactured and exported by UGITECH, entered, or withdrawn from warehouse, for consumption on or after April 23, 2007, (the effective date), and to discontinue collection of cash deposits of antidumping duties. We will instruct CBP to continue to suspend liquidation of all entries of subject merchandise from all other exporters or producers. CBP shall continue to require

a cash deposit equal to the estimated amount by which the normal value exceeds the U.S. price. The suspension of liquidation instructions will remain in effect until further notice. The Section 129 Determination all-others rate will be the new cash deposit rate for all exporters of subject merchandise for whom the Department has not calculated an individual rate.

With respect to Stainless Steel Bar from Germany, we will instruct CBP to liquidate without regard to antidumping duties entries of the subject merchandise manufactured and exported by Einsal, entered, or withdrawn from warehouse, for consumption on or after April 23, 2007, (the effective date), and to discontinue collection of cash deposits of antidumping duties. We will instruct CBP to continue to suspend liquidation of all entries of subject merchandise from all other exporters or producers. CBP shall continue to require a cash deposit equal to the estimated amount by which the normal value exceeds the U.S. price. The suspension of liquidation instructions will remain in effect until further notice. The Section 129 Determination all-others rate will be the new cash deposit rate for all exporters of subject merchandise for whom the Department has not calculated an individual rate.

With respect to Stainless Steel Bar from Italy, we will instruct CBP to liquidate without regard to antidumping duties entries of the subject merchandise manufactured and exported by Acciaiera Valbruna S.p.A., Acciaiera Foroni S.p.A. and Rodacciai S.p.A., entered, or withdrawn from warehouse, for consumption on or after April 23, 2007, (the effective date), and to discontinue collection of cash deposits of antidumping duties. We will instruct CBP to continue to suspend liquidation of all entries of subject merchandise from all other exporters or producers. CBP shall continue to require a cash deposit equal to the estimated amount by which the normal value exceeds the U.S. price. The suspension of

liquidation instructions will remain in effect until further notice. The Section 129 Determination all-others rate will be the new cash deposit rate for all exporters of subject merchandise for whom the Department has not calculated an individual rate.

With respect to Stainless Steel Bar from the United Kingdom, we will instruct CBP to liquidate without regard to antidumping duties entries of the subject merchandise manufactured and exported by Corus Engineering Steels Ltd., entered, or withdrawn from warehouse, for consumption on or after April 23, 2007, (the effective date), and to discontinue collection of cash deposits of antidumping duties. We will instruct CBP to continue to suspend liquidation of all entries of subject merchandise from all other exporters or producers. CBP shall continue to require a cash deposit equal to the estimated amount by which the normal value exceeds the U.S. price. The suspension of liquidation instructions will remain in effect until further notice. The Section 129 Determination all-others rate will be the new cash deposit rate for all exporters of subject merchandise for whom the Department has not calculated an individual rate.

With respect to Stainless Steel Wire Rod from Spain, we will instruct CBP to continue to suspend liquidation of all entries of subject merchandise from all exporters or producers. CBP shall continue to require a cash deposit equal to the estimated amount by which the normal value exceeds the U.S. price. The suspension of liquidation instructions will remain in effect until further notice. The Section 129 Determination all-others rate will be the new cash deposit rate for all exporters of subject merchandise for whom the Department has not calculated an individual rate.

With respect to Stainless Steel Wire Rod from Italy, we will instruct CBP to continue to suspend liquidation of all entries of subject merchandise from all exporters or producers. CBP shall continue to require a cash deposit equal to

the estimated amount by which the normal value exceeds the U.S. price. The suspension of liquidation instructions will remain in effect until further notice. The Section 129 Determination all-others rate will be the new cash deposit rate for all exporters of subject merchandise for whom the Department has not calculated an individual rate.

With respect to Stainless Steel Plate in Coils from Belgium, we will instruct CBP to continue to suspend liquidation of all entries of subject merchandise from all exporters or producers. CBP shall continue to require a cash deposit equal to the estimated amount by which the normal value exceeds the U.S. price. The suspension of liquidation instructions will remain in effect until further notice. The Section 129 Determination all-others rate will be the new cash deposit rate for all exporters of subject merchandise for whom the Department has not calculated an individual rate.

With respect to Certain Cut-To-Length Carbon-Quality Steel Plate Products from Italy, we will instruct CBP to continue to suspend liquidation of all entries of subject merchandise from all exporters or producers. CBP shall continue to require a cash deposit equal to the estimated amount by which the normal value exceeds the U.S. price. The suspension of liquidation instructions will remain in effect until further notice. The Section 129 Determination all-others rate will be the new cash deposit rate for all exporters of subject merchandise for whom the Department has not calculated an individual rate.

With respect to Certain Pasta from Italy, we will instruct CBP to continue to suspend liquidation of all entries of subject merchandise from all exporters or producers. CBP shall continue to require a cash deposit equal to the estimated amount by which the normal value exceeds the U.S. price. The suspension of liquidation instructions will remain in effect until further notice. The Section 129 Determination all-others rate will be the new cash deposit rate for all exporters

of subject merchandise for whom the Department has not calculated an individual rate.

The cash deposit rates will remain unchanged for those companies that we are not revoking and whose cash deposit rates since the original investigation have been superseded by administrative reviews.

These Section 129 Determinations are issued and published in accordance with section 129(c)(2)(A) of the URAA.

Dated: April 30, 2007.

David M. Spooner,

Assistant Secretary for Import Administration.

Appendix I

Issues Raised in the Issues and Decision Memorandum

Comment 1: Whether the Department Has the Authority to Implement the WTO Appellate Body Decision Comment 2: Targeted Dumping

Comment 3: Treatment of Unliquidated Entries

Comment 4: Calculation of All-Others Rate

Comment 5: Clerical Error Allegation in the Investigation of Stainless Steel Sheet and Strip in Coils from Italy

Comment 6: Clarification of Valbruna Exporter Name

Comment 7: The Department's Briefing Schedule

APPENDIX B

Section 129 Determinations

Public Document

A-122-838, A-421-807, A-427-820,
A-428,830, A-475-829, A-412-822,
A-401-806, A-469-807, A-475-820,
A-423-808, A-475-824, A-475-818

April 9, 2007

MEMORANDUM

TO: David Spooner
Assistant Secretary
for Import Administration

FROM: Stephen Claeys
Deputy Assistant Secretary
for Import Administration

RE: Final Results for the Section 129 Determinations: Certain Hot-rolled Carbon Steel from the Netherlands, Stainless Steel Bar from France, Stainless Steel Bar from Germany, Stainless Steel Bar from Italy, Stainless Steel Bar from the United Kingdom, Stainless Steel Wire Rod from Sweden, Stainless Steel Wire Rod from Spain, Stainless Steel Wire Rod from Italy, Certain Stainless Steel Plate in Coils from Belgium, Stainless Steel Sheet and Strip in Coils from Italy, Certain Cut-ToLength Carbon-Quality Steel Plate Products from Italy, Certain Pasta from Italy

SUBJECT: Issues and Decision Memorandum for the Final Results of the Section 129 Determinations

Summary

This memorandum addresses issues briefed in the above-referenced section 129 proceedings. Below is a complete list of the issues in this proceeding for which we have received comments from the parties:

Comment 1: Whether the Department of Commerce (the Department) Has the Authority to Implement the WTO Appellate Body Decision

Comment 2: Targeted Dumping

Comment 3: Treatment of Unliquidated Entries Comment 4: Calculation of All-Others Rate

Comment 5: Clerical Error Allegation in the Investigation of Stainless Steel Sheet and Strip in Coils from Italy

Comment 6: Clarification of Valbruna Exporter Name Comment 7: The Department's Briefing Schedule

Background

On February 16, 2004, the European Communities ("EC") requested the establishment of a World Trade Organization (WTO) dispute settlement panel ("the Panel") challenging, among other things, the final determinations of fifteen anti-dumping duty investigations concluded by the Department. The Panel circulated its report on October 31, 2005, finding that the Department's calculation of the margins of dumping when using the average-to-average comparison methodology in the fifteen investigations was inconsistent with U.S. obligations under the WTO agreements. *United States—Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")*, WT/DS294/R (October 31, 2005) (*"US—Zeroing (EC)"*). The United States did not appeal this aspect of the Panel's report. On March 6, 2006, the Department

published a notice in the Federal Register proposing that it would no longer make average-to-average comparisons in investigations without providing offsets for non-dumped comparisons. Antidumping Proceedings: Calculation of the Weighted Average Dumping Margin During an Antidumping Duty Investigation, 71 FR 11189 (March 6, 2006).

The EC and the United States appealed other aspects of the Panel's report not relevant to these proceedings. The WTO Appellate Body issued its report on April 18, 2006, addressing those aspects of the Panel's report appealed by the EC and the United States. *United States—Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")*, WT/DS294/AB/R (April 18, 2006). The Panel's finding concerning the fifteen investigations involving EC member countries, however, remained unchanged.

On May 9, 2006, the WTO Dispute Settlement Body ("DSB") adopted the Panel's report as modified by the Appellate Body report. On May 30, 2006, the United States indicated to the DSB that the United States intends to implement the DSB's recommendations and rulings.

Pursuant to the Panel's findings in *US—Zeroing (EC)*, the Department published its final modification, adopting its March 6, 2006, proposal. See Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation; Final Modification, 71 FR 77722 (December 27, 2006) ("Final Modification").

The Department is conducting "Section 129 Determinations" with respect to twelve different antidumping investigations involving certain products originating in various member

states of the EC,[1] and applying the Final Modification to those proceedings.

On February 26, 2007, the Department issued the Preliminary Results for these Section 129 Determinations. See Memorandum from Stephen J. Claeys, Deputy Assistant Secretary, to David M. Spooner, Assistant Secretary, Regarding Section 129 Determinations: Calculation of the Weighted-Average Margins (Preliminary Results). In the Preliminary Results, the Department determined to implement the recommendations and rulings of the DSB by offsetting dumped sales with non-dumped sales in the challenged investigations as explained in the Final Modification.

We received case briefs and/or rebuttal briefs, respectively, from the following parties:

- Several domestic interested parties (hereinafter referenced as "the steel and pasta petitioners"), in the following investigations:
    - Carpenter Technology Corporation, Crucible Speciality Metal Division, Crucible Materials Corporation, Electralloy Corporation, a Division of G.O. Carlson, Inc., and Universal Stainless & Alloy Products, Inc. in the investigation of Stainless Steel Bar from Italy;

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[1] Although the EC challenged fifteen antidumping investigations, the Department revoked the antidumping duty order associated with three of those investigations: Certain Cut-to-Length Carbon-Quality Steel Plate from France (A-427-816). Revocation of Antidumping Duty Order: Certain Cut-To-Length Carbon-Quality Steel Plate from France, 70 FR 72787 (December 7, 2005); Certain Stainless Steel Sheet and Strip in Coils from France and the United Kingdom; Final Results of Sunset Reviews and Revocation of Antidumping Duty Order, 70 FR 44894 (August 4, 2005). Because a Section 129 Determination affects only entries made on or after the date on which USTR instructs the Department to implement the determination, there is no need to issue Section 129 Determinations with respect to these three investigations.

- Carpenter Technology Corporation, Crucible Speciality Metal Division, Crucible Materials Corporation, Electralloy Corporation, a Division of G.O. Carlson, Inc., Universal Stainless & Alloy Products, Inc., and Valbruna Slate Steels Inc. in the investigations of Stainless Steel Bar from France, Germany and the United Kingdom ;

- Carpenter Technology Corporation and Universal Stainless & Alloy Products, Inc. in the investigations of Stainless Steel Wire Rod from Sweden, Stainless Steel Wire Rod from Italy, and Stainless Steel Wire Rod from Spain;

- New World Pasta Company, American Italian Pasta Company, and Dakota Growers Pasta Company in the investigation of Certain Pasta from Italy; and

- Allegheny Ludlum and AK Steel Corporation in the investigations of Stainless Steel Sheet and Strip in Coils and Italy and Stainless Steel Plate in Coils from Belgium.

- Nucor Corporation (Nucor) in the investigation of Certain Hot-Rolled Carbon Steel Flat Products from the Netherlands and the investigation of Cut-to-Length Carbon-Quality Steel Plate from Italy

- IPSCO Steel Inc. Steel Dynamics and Gallatin Steel (IPSCO, Steel Dynamics and Gallatin)in the investigations of Certain Cut-to-Length Carbon-Quality Steel Plate from Italy and Certain Hot-Rolled Carbon Steel Flat Products from the Netherlands

- United States Steel Corporation (U. S. Steel), in the investigation of Certain Hot-Rolled Carbon Steel Flat Products from the Netherlands

- Mittal Steel USA, Inc. (Mittal USA) in the investigations of Certain Hot-Rolled Carbon Steel Flat Products from the Netherlands and Cut-to-Length Carbon-Quality Steel Plate from Italy
- UGITECH S.A (Italy) and UGITECH S.A. (UGITECH) in the investigations of Stainless Steel Bar from Italy and Stainless Steel Bar from France, respectively
- ThyssenKrupp Acciai Speciali Terni S.p.A. and ThyssenKrupp AST USA (TKAST) in the investigation of Stainless Steel Sheet and Strip in Coils from Italy
- Fagersta Stainless AB (Fagersta) in the investigation of Stainless Steel Wire Rod from Sweden
- Acciaierie Valbruna S.p.A. (Valbruna) in the investigation of Stainless Steel Bar from Italy
- Corus Staal BV (Corus) in the investigation of Certain Hot-Rolled Carbon Steel Flat Products from the Netherlands
- The Government of the United Kingdom in the investigation of Stainless Steel Bar from the United Kingdom
- The European Commission in all investigations
- The Government of France in the investigation of Stainless Steel Bar from France
- BGH Edelstahl Freital GmbH, BGH Edelstahl Lippendorf GmbH, BGH Edelstahl Lugau GmbH and BGH Edelstahl Siegen Gmbh (BGH) in the investigation of Stainless Steel Bar from Germany
- Foroni S.p.A. and Foroni Metals of Texas, Inc. (collectively, Foroni), in the investigation of Stainless Steel Bar from Italy

- Walzwerke Einsal Gmbh (Einsal), in the investigation of Stainless Steel Bar from Germany
- Rodacciai S.p.A. (Rodacciai), in the investigation of Stainless Steel Bar from Italy

Nucor, a domestic interested party, requested a hearing in the investigation of Certain Carbon Steel Flat Products from the Netherlands. Nucor withdrew its request on March 30, 2007. TKAST requested a hearing in the investigation of Stainless Steel Sheet and Strip in Coils from Italy. A hearing was held in this section 129 proceeding on April 6, 2007.

DISCUSSION OF ISSUES

Comment 1: Whether the Department Should Implement, and Has the Authority to Implement, the WTO Appellate Body Decision

DISCUSSION OF CASE BRIEFS

The steel and pasta petitioners argue that the WTO Appellate Body's assertion that "zeroing" is inconsistent with Articles 1, 2.1, 2.4, 2.4.2, 5.8, 9.1, 9.3, 9.5, 11, 18.3, and 18.4 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs on Trade 1994 (AD Agreement), Article VI of the General Agreement on Tariffs and Trade 1994 (GATT 1994), and Article XVI:4 of the WTO Agreement is wrong. The steel and pasta petitioners contend that the United States, in compliance with the URAA, codified a new provision, section 771(35) of the Tariff Act of 1930, as amended (the Act), which defines "dumping margin" and "weighted-average dumping margin." According to the steel and pasta petitioners, this section of the Act indicates that an item is considered to have been dumped when normal value exceeds the export price or constructed export price, and that when export price or constructed export price is not below normal value then no dumping has occurred.

The steel and pasta petitioners also argue that, in past negotiations, the WTO Members have permitted "zeroing." The steel and pasta petitioners contend that the Appellate Body has only been able to attack "zeroing" by legislating new rights and obligations, rather than interpreting the Members' negotiated rights and obligations. The steel and pasta petitioners also note the criticisms made by the United States against the Appellate Body's recent findings on "zeroing."

The steel and pasta petitioners contend that the Department has failed to explain whether its change to its longstanding practice is consistent with U.S. law. According to the steel and pasta petitioners, the Department has only stated that the Courts have not found that zeroing was mandated by the statute. However, the steel and pasta petitioners argue that the Courts have approved the Department's practice of "zeroing."

The steel and pasta petitioners argue that the Department must specifically explain if it agrees with the Appellate Body's decision, and if this decision is in accordance with U. S. law. Moreover, the steel and pasta petitioners assert that, if the Department believes that the Appellate Body decision violates U.S. law, the Department must state whether it is nevertheless required to implement this decision. If the Department does not believe that U. S. law permits it to stop "zeroing", or cannot explain this policy, but nevertheless implements the Appellate Body decision, the steel and pasta petitioners contend, then the "Executive Branch will be engaging in unconstitutional legislative action."

Mittal USA argues that the Court of Appeals for the Federal Circuit (CAFC), in *Timken v. U. S.*, 354 F.3d 1334, 1341-42 (Fed. Cir. 2004) (*Timken*) erred in finding that "zeroing" was not required by the statute. According to Mittal USA, there can only be a "dumping margin" when there is "dumping." For Mittal USA, negative values cannot result in dumping margins and thus should not be included in the weighted-average dumping margin. In support, Mittal USA points to 19

U.S.C. 1677(35)(A) and (B) {sections 771(35)(A) and (B) of the Act} (a dumping margin is "determined by dividing the aggregate *dumping margins* determined for a specific exporter or producer by the aggregate export prices and constructed export prices of such exporter or producer") and 19 USC 1673c(b)(2) {section 734(b)(2) of the Act}, a provision that allows the Department to suspend an investigation if the exporters of the subject merchandise agree "to revise their prices to eliminate completely any amount by which normal value exceeds the export price (or constructed export price) of that merchandise." Moreover, Mittal USA argues, 19 U.S.C. 1677(34) {section 771(34) of the Act} "specifies that the terms 'dumped' and 'dumping' refer to sales or likely sales at less than fair value." Mittal USA contends that the Court in *Timken* did not address the context for the interpretation of the word "exceeds" in 19 U.S.C. 1673c(b)(2) {section 734(b)(2) of the Act}. Mittal USA also contends that not zeroing would result in the same margin regardless of whether weighted average or individual U.S. transaction prices are compared to a weighted average normal value, thus rendering the Department's authority to address "targeted dumping" meaningless. Moreover, Mittal USA argues, it is not permissible for the Department to interpret the statute as allowing for zeroing under one methodology but not another.

IPSCO, Steel Dynamics and Gallatin assert that the term "dumping margin" is clearly defined by the statute as the amount by which the normal value exceeds the export price. IPSCO, Steel Dynamics and Gallatin cite the CAFC's decision in *Timken* and argues that unlike the word "exceeds," which the CAFC found "does not unambiguously preclude the calculation of a negative dumping margin," the definition of "dumping margin" in the statute identifies "normal value" first in the equation and "export price" second in the equation. Therefore, according to IPSCO, Steel Dynamics and Gallatin, "when the full statutory definition of the dumping

margin is interpreted, it is clear the offset cannot be included in the statutory definition of the dumping margin."

In further discussion of the *Timken* decision, IPSCO, Steel Dynamics and Gallatin argue that neither the CAFC, nor any other U.S. court, has ever ruled that it would be reasonable to offset dumped sales by non-dumped sales. IPSCO, Steel Dynamics and Gallatin contend that this new policy would effectively establish a credit for assessment which was not contemplated by the statute. IPSCO, Steel Dynamics and Gallatin argue this is the case because U.S. law equates the dumping margin to the assessment amount at 19 U.S.C. 1675(a) {section 752 of the Act}. IPSCO, Steel Dynamics and Gallatin note that this case involves dumping margins in investigations and not reviews, to which 19 U.S.C. 1675(a) pertains; however, IPSCO, Steel Dynamics and Gallatin argue, the issue of whether the offset is part of the dumping margin is the same in investigations and reviews. Since the statutory definition is the same in investigations as in reviews, IPSCO, Steel Dynamics and Gallatin assert, the Department's new practice clearly violates the Department's requirement to determine a dumping margin for each entry in reviews. IPSCO, Steel Dynamics and Gallatin contend that the Department's new practice also violates the Statement of Administrative Action's (SAA) statement of methodology for calculating the dumping margin in investigations.

IPSCO, Steel Dynamics and Gallatin assert that the WTO decision that the Department offset dumped sales by non-dumped sales is outside of its scope because it is not based on the language of the AD Agreement. In particular, IPSCO, Steel Dynamics and Gallatin note that the term "dumping" is defined in the AD Agreement in a manner nearly identical to that in U.S. law in that it defines dumping as occurring when the export price is less than the normal value. IPSCO, Steel Dynamics and Gallatin note that the AD Agreement does not speak to calculating dumping based on "a product as a whole"

as the Appellate Body found. This finding, IPSCO, Steel Dynamics and Gallatin assert, indicates that the Appellate Body "pursues its own trade agenda" and is "dishonest, deceitful, and cannot be trusted." IPSCO, Steel Dynamics and Gallatin assert that it is generally impossible to make a meaningful comparison of normal value and export price at the level of the "product as a whole."

IPSCO, Steel Dynamics and Gallatin argue that Article 17.6(ii) of the AD Agreement specifies that there may be provisions that allow for "more than one permissible interpretation." In this case, IPSCO, Steel Dynamics and Gallatin aver, the Appellate Body has ruled that the only permissible interpretation is its offset scheme. IPSCO, Steel Dynamics and Gallatin note that the transaction-to-transaction methodology has also been found impermissible by the Appellate Body.

U.S. Steel asserts that a complete reading of the statute, in particular 19 U.S.C. 1677f-1(d) {section 771A(d) of the Act}, makes it clear "beyond all doubt that the statute mandates the denial of offsets." U.S. Steel argues that this is the case because a respondent's dumping margin would always be the same regardless of whether weighted average or individual U.S. transaction prices are compared to a weighted average normal value. Such an outcome would have rendered Congress' actions "pointless," U.S. Steel avers, in providing for the different comparison methods in the statute. According to U.S. Steel, "this undeniable fact conclusively demonstrates that Congress intended for the Department not to offset dumping margins with non-dumped sales." U.S. Steel asserts that the United States and three separate WTO panels have recognized the truth of this principle, and that the statute "cannot be construed to contain a meaningless provision."

Corus argues that the Department was correct to offset dumped sales with non-dumped sales in the Preliminary Results. Corus avers that "as a result of *US—Zeroing (EC)*,

the Department is obligated to redetermine the margin for the Dutch Steel AD Investigation without zeroing."

DISCUSSION OF REBUTTAL BRIEFS

U.S. Steel argues that Corus is "flatly wrong" in contending that the Department was correct to apply offsets for non-dumped sales in the Preliminary Results. U.S. Steel affirms that WTO decisions like *US—Zeroing (EC)* are not binding on the United States. Moreover, U.S. Steel contends, U.S. law does not permit the Department to apply offsets for non-dumped sales.

Nucor expresses support for arguments made by other domestic interested parties regarding why it was impermissible under the statute for the Department to abandon its "zeroing" practice. Nucor affirms that "the Department cannot alter the methodology until Congress changes the law."

Corus asserts that domestic interested parties' arguments that the statute requires "zeroing" and that Congress must amend the law for the Department not to "zero" are "devoid of any legal support" and contradict arguments made by the Department itself before the CIT regarding the absence of statutory language mandating zeroing. Corus contends that both the CIT and CAFC have clearly stated that the statute does not mandate "zeroing." Corus argues that the Department, under the principle of *stare decisis*, is now bound by these decisions, and has in fact implemented its new policy in the recent final determination of activated carbon from China. Corus also argues that, assuming the domestic interested parties were correct that the Department in not bound by CAFC precedent, the domestic interested parties' arguments are "nevertheless unavailing." Corus contends that the CAFC has found that the word "exceeds" in 19 U.S.C. 1677(35)(A) allows for both positive and negative numbers. Corus further argues that because Mittal has found a provision in the statute where the word "exceeds" may only be used to refer to

positive amounts "does not detract from the *Timken* court's analysis of the term in a different context." Corus cites Supreme Court decisions in *Atlantic Cleaners & Dryers, Inc. v. United States*, 286 U.S. 427, 433 (1932) and *United States v. Cleveland Indians Baseball Co.*, 532 U.S. 200, 213 (2001) in support of its contention that "because 'exceeds' is not a defined term, it need not be given a single interpretation."

Valbruna and Foroni argue that the Department clearly has the authority to offset dumped sales with non-dumped sales and that several court decisions, particularly the *Timken* decision, belie the domestic interested parties' claims that "zeroing" is mandated by the statute. Foroni also asserts that the "Department has no discretion" but to implement the WTO panel's report once it has received a written request from USTR to do so.

BGH argues that the Department's "change in methodology is the result of a long and thorough process." BGH contends that it is not inappropriate for the Department to modify its practice to bring it into conformity with the AD Agreement. Moreover, BGH argues, the Department has already addressed the issue of a Congressional amendment to allow it to offset dumped sales with non-dumped sales.

Einsal, Fagersta, and Rodacciai argue that the steel and pasta petitioners' "platitudes about the Appellate Body 'disregarding its charter' and 'disrupting the constitutional balance of the WTO' are irrelevant." Einsal, Fagersta, and Rodacciai argue that the Department need not agree with a WTO decision in order to implement that decision. Moreover, Einsal, Fagersta, and Rodacciai contend that the Department "is not implementing a decision of the Appellate Body, but rather certain aspects of the decision of the lower-body WTO panel, which decision the Department chose not to appeal." Einsal, Fagersta, and Rodacciai maintain that the USTR's criticism of the Appellate Body were limited to the Appellate Body's findings related to zeroing outside of the context of

average-to-average comparisons in investigations. Einsal, Fagersta, and Rodacciai further contend that the Department has the "full authority to end zeroing," and that the decision not to "zero" "is within the Department's prerogative."

Department Position:

While the Department, through these section 129 proceedings, is taking actions to bring these investigations into conformity with an adopted WTO panel report, the Department must apply U.S. law. *See* SAA at 1023 (USTR may request that the Department issue a new determination in response to a WTO report only if the action required to render the agency determination not inconsistent with the panel report is in accord with U.S. law). The CAFC, in construing U.S. law, held that the denial of offsets when calculating the weighted-average dumping margin is not required by statute, but is instead a reasonable interpretation of the statute. *See Corus Staal BV v. Department of Commerce*, 395 F.3d 1343, 1347 (Fed. Cir. 2005), *cert. denied*, 126 S. Ct. 1023 (2006); *Timken Co. v. United States*, 354 F.3d 1334, 1341-42 (Fed. Cir.), *cert. denied sub nom., Koyo Seiko Co. v. United States*, 543 U.S. 976 (2004). While many parties have expressed disagreement with these CAFC decisions, they are binding legal precedent. *See Paul Muller Industrie GmbH v. United States*, 435 F. Supp. 2d 1241, 1245 (CIT 2006) (stating new argument alone does not defeat binding precedent).

Section 771(35)(A) of the Act defines "dumping margin" as "the amount by which the normal value exceeds the export price or constructed export price of the subject merchandise." The "weighted average dumping margin" is defined as "the percentage determined by dividing the aggregate dumping margins determined for a specific exporter or producer by the aggregate export prices and constructed export prices of such exporter or producer." Section 771(35)(B) of the Act. Some parties argue that the use of the word "exceeds" in section 771(35)(A) of the Act demonstrates that only positive dump-

ing margins should be aggregated when calculating the weighted-average dumping margin. This position, however, has been rejected by the CAFC in *Timken*.

In interpreting section 771(35)(A) of the Act, the CAFC examined closely the use of the word "exceeds." Although dictionary definitions cited to the CAFC defined the word "exceeds" in terms of being greater than or going beyond something else, the court found that these dictionary definitions were not so clear so as to compel the denial of offsets. *Timken*, 435 F.3d at 1341. Rather, in a mathematical context, the court held that the word "'exceeds' does not unambiguously preclude the calculation of a negative dumping margin." *Id.*

The Department's calculation of the weighted-average dumping margins in these section 129 proceedings, therefore, is consistent with U.S. law. The Department has aggregated all of the comparison results for a particular exporter or producer, regardless of whether the specific comparisons yielded a positive or negative result. As the CAFC held in *Timken*, the use of the word "exceeds" in section 771(35)(A) of the Act does not require the exclusion of those comparisons that yielded a negative result.

Mittal USA argues that the CAFC in *Corus* and *Timken* did not consider the use of the word "exceeds" as it is found in section 734(b)(2) of the Act. Section 734(b)(2) provides the authority for the Department to enter into a suspension agreement if the exporters who account for substantially all of the imports of the subject merchandise agree to completely eliminate any amount by which normal value exceeds export price or constructed export price. As stated above, such argument does not defeat the fact that *Corus* and *Timken* are binding precedent. *Paul Muller*, 435 F.Supp.2d at 1245. Moreover, section 734 of the Act does not concern the definition of "dumping margin," but rather explains the conditions under which the Department may enter into a

suspension agreement. As such, the Department finds Mittal's argument unpersuasive.

With respect to the argument that interpreting the statute so as to permit the granting of offsets when using average-to-average comparisons in an investigation would nullify the targeted dumping methodology of section 777A(d)(1)(B), this argument makes certain presumptions concerning how the Department would implement the targeted dumping methodology. To date, the Department has not used the targeted dumping methodology, and has not determined how it would apply it. Moreover, the Department's Final Modification was expressly limited to the use of average-to-average comparisons in investigations and was done for the stated purpose of bringing these investigations into conformity with the panel report in *US—Zeroing (EC)*. Consistent with the basis and purpose of its change in methodology, the Department has not foreclosed any methodological options except for the continued use of zeroing with average-to-average comparisons in investigations. Accordingly, the Department will consider, to the extent appropriate, the nullification argument in any future investigation in which it considers whether and how to apply the targeted dumping methodology.

With respect to the argument that the calculation methodology used in these section 129 proceedings is inconsistent with the SAA, the SAA does not specifically state that in aggregating dumping margins to calculate the weighted-average dumping margin the Department would only consider those comparisons with positive results. *See* SAA at 842 (describing average-to-average comparison methodology). Accordingly, the Department disagrees that the SAA precludes the Department from permitting offsets in these Section 129 Determinations.

With respect to the argument that providing offsets would be inconsistent with section 751(a) of the Act as it concerns the assessment of antidumping duties, these section 129 proceed-

ings address only the 12 antidumping investigations that were subject to the WTO panel's report in *US—Zeroing (EC)*. The results of these section 129 proceedings do not address the actual assessment of antidumping duties. As stated above, the Department's Final Modification was expressly limited to the use of average-to-average comparisons in investigations and was done for the stated purpose of bringing these investigations into conformity with the panel report in *US—Zeroing (EC)*. Consistent with the basis and purpose of its change in methodology, the Department has not foreclosed any methodological options except for the continued use of zeroing with average-to-average comparisons in investigations. Accordingly, the Department disagrees that these section 129 proceedings are in any way inconsistent with section 751(a) of the Act.

Comment 2: Targeted Dumping

Multiple domestic interested parties argue that the Department should accept their targeted dumping allegations outside of the "normal" deadline for such allegations in the Department's regulations. These parties note that the Department's regulations at 19 CFR 351.301(d)(5) and 351.414(f)(1) "normally" require that targeted dumping allegations be made 30 days prior to the preliminary determination in an investigation. However, these parties argue that they relied on the Department's original methodology of not offsetting dumped sales by non-dumped sales and believed that this methodology would account for the targeted dumping that was occurring and that is masked by applying offsets. Therefore, these parties contend, the Department should now consider their targeted dumping allegations. Mittal Steel USA, moreover, notes that the European Union has employed a targeted dumping analysis without offsetting dumped sales with non-dumped sales. The following parties have alleged in their case briefs that the listed respondent parties engaged in targeted

dumping by customer, by region, or by regional division, during the original investigations:

1) The steel and pasta petitioners, allegations of targeted dumping by customer, by region, and by regional division:

    Stainless Steel Bar from Italy:
    Foroni
    Rodacciai
    Valbruna

    Stainless Steel Bar from France:
    Ugine-Savoie Imphy, S.A.

    Stainless Steel Bar from the United Kingdom:
    Corus.

    Stainless Steel Bar from Germany:
    Einsal

    Stainless Steel Wire Rod from Sweden:
    Fagersta

2) Nucor Corporation, allegation of targeted dumping by customer and time period; U. S. Steel, allegation of targeted dumping by customer; Mittal Steel, allegation of targeted dumping by customer:

    Certain Hot-Rolled Carbon Steel Flat Products from the Netherlands

Numerous respondent parties, including Corus, Valbruna, BGH, Einsal, UGITECH, Rodacciai, and Foroni, argue that the petitioners' allegations regarding targeted dumping are untimely. These parties argue that in its initiation notice of March 1, 2007, the Department clearly defined the scope of these proceedings as limited to solely recalculating the dumping margins using the methodology described in the *Final Modification*. Petitioners' targeted dumping allegations, Corus contends, "fit nowhere within that scope" and, since the petitioners also ask the Department to continue to zero,

are also "contrary to the scope." UGITECH argues, moreover, that "the limited scope of these proceedings is mandated by Section 129, which limits the Department to 'reopen only those matters 'integral' to implementing an adverse WTO decision." UGITECH argues that, if the Department were to accept these allegations, then a reconsideration of the entire investigation would have to follow. Valbruna further argues that the petitioners' request for an extension to file a targeted dumping allegation is also untimely. Corus asks the Department to strike petitioners' allegations concerning targeted dumping from the record.

Corus and Foroni maintain that, contrary to petitioners' assertions, the situation here is no different from that dealt with by the Department in *Activated Carbon from the PRC*, where, they contend, the Department explained that its "change in margin computation methodology is legally distinct from the targeted dumping legal provisions." Moreover, Corus and Foroni argue, the petitioners in *Activated Carbon from the PRC* made the same arguments as the petitioners in this proceeding regarding not being aware that the Department was going to change its methodology. Disputing the petitioners' contention that they believed the Department's original methodology would cover the targeted dumping that was occurring, Rodacciai, Fagersta, and Einsal contend that "petitioners had the data at the time to choose either the regular methodology or the targeted dumping methodology." BGH argues that the purported new margin for Einsal under the petitioners' targeted dumping allegation, which is much larger than Einsal's original investigation rate, "shows either that the petitioners did not consider targeted dumping during the original investigation or that their current calculations are wildly exaggerated."

Regarding the importance of the regulatory deadline for targeted dumping allegations, Corus, Rodacciai, Fagersta and Einsal argue that, in the preamble to the Department's regu-

lations, the Department specifically rejected calls to allow targeted dumping allegations at any time during an anti-dumping investigation prior to the filing of the case briefs. Thus, Corus contends, "by adopting a deadline that purposefully antedates the preliminary determination, the Department implicitly rejected the notion that the choice in margin computation methodology determines whether a targeted dumping allegation should be made." Rodaccia, Fagersta, and Einsal note, moreover, that the Department explained, in the preamble to its regulations, that allowing targeted dumping allegations after 30 days prior to the preliminary determination "would make any verification of issues relative to the allegation extremely difficult."

Foroni and Corus contend that the targeted dumping provision addresses both the practice of charging lower prices in one subset of the U.S. market than in the home market and the practice of charging lower prices in that U.S. market subset as compared to other parts of the United States, which, they argue, the petitioners have failed to do. Corus further contends that, if the Department were to find targeted dumping in this case regarding time period, then the ITC would also need to reconsider its analysis regarding injury. Corus affirms that the Department's only guidance on targeted dumping comes from the *Redetermination on Remand Final Determination of Sales at Less than Fair Value of Certain Pasty from Italy* (Department of Commerce Aug. 28, 1998) (Pasta Remand). According to Corus, if the evidentiary requirements and testing procedures developed in the Pasta Remand are applied in this case, then none of the allegations made by petitioners "can withstand scrutiny." Corus contends that the petitioners have instead employed differing methodologies that do not capture factors of any form of targeting. Moreover, Corus avers that the Department cannot extend a targeted dumping analysis to all of its sales, as U. S. Steel and Mittal argue.

Valbruna, BGH, Einsal, Fagersta, UGITECH, Rodacciai, and Foroni all argue that the petitioners' respective arguments regarding targeted dumping in their cases are insufficient. UGITECH, Valbruna, and Foroni argue that the petitioners' allegations rely on dumping margins, rather than prices, as required by the Department's regulations. Valbruna further argues that petitioners' approach would have the Department find targeted dumping wherever there is evidence of any positive margin. Rodacciai, Fagersta, and Einsal contend, moreover, that "petitioners have not supplied the Department with a standard and appropriate statistical analysis of U. S. prices," nor with a basis for their allegations.

Foroni and Valbruna contend that the petitioners' allegations are distortive. Foroni asks whether it can "possibly be targeting when the purported sweep is so broad." Several parties, moreover, point to what they consider inaccuracies in the petitioners' targeted dumping calculations. Foroni argues that price differences in time periods were nothing more than a reflection of a general trend of increasing prices in the market. Lastly, UGITECH asserts that "even if the Department were to accept Petitioners' claims of targeted dumping, the weighted average dumping margin using the method specified in the regulations for average-to-average for non-targeted dumping sales and the targeted dumping methodology for the remainder would still produce a negative dumping margin."

Department Position:

First, the Department has not stricken domestic interested parties' allegations from the record. We invited interested parties to comment on all issues they believed continued to be relevant in this proceeding, which domestic interested parties have done in making these allegations. We note, however, that, for the reasons described below, we are not considering these allegations in these proceedings.

The Department's regulations provide, "The Secretary normally will examine *only targeted dumping described in an allegation, filed within the time indicated in § 351.301(d)(5).*" 19 CFR 351.414(f)(3) (emphasis added). That deadline is "no later than 30 days before the scheduled date of the preliminary determination." 19 CFR 351.301(d)(5).

In the preamble to the Department's regulations, the Department declined to adopt suggestions to extend or eliminate this deadline. *Antidumping Duties; Countervailing Duties*, 62 FR 27295, 27338 (May 19, 1997) (final rule). The Department reasoned that the regulation gave domestic interested parties sufficient time to analyze the relevant data, and allow the Department to consider the allegation before issuing the preliminary determination. *Id.* at 27338, 27375. The Department stated that a later deadline would make verification issues extremely difficult. *Id.* at 27375. The Department noted that it intended to be flexible with the deadline where appropriate, such as where the timing of the filing of the responses did not permit an adequate analysis. *Id.* at 27338, 27375.

In all of the investigations subject to these section 129 proceedings, there was ample time during the original investigations for domestic interested parties to analyze the responses and make targeted dumping allegations. At this late stage, the Department does not have sufficient time to make a preliminary finding regarding targeted dumping, and allow time for comment. Additionally, the Department is unable at this time to conduct verification regarding the targeted dumping allegations. Accordingly, the Department does not find that there is "good cause" to extend the deadline in 19 CFR 351.301(d)(5) and consider the targeted dumping allegations made in these section 129 proceedings.

With respect to the argument that in the original investigations the domestic interested parties relied on the Department's denial of offsets to account for any targeted dumping that may have been masked by applying offsets, the Depart-

ment notes that the targeted dumping methodology, section 777A(d)(1)(B) of the Act, is an independent provision of the antidumping law, unrelated to the Department's modification of its methodology of calculating weighted-average dumping margins in these investigations. Thus, if the domestic interested parties believed that targeted dumping was occurring, they had the opportunity to make their targeted dumping allegations in a timely manner.

Comment 3: Treatment of Unliquidated Entries

Fagersta, respondent in the investigation of Stainless Steel Wire Rod from Sweden, argues that the Department has the authority to apply the revocation of the antidumping duty order to all unliquidated entries. Fagersta notes that, when an antidumping investigation is negative, section 735(c)(2) of the Act requires the Department to "terminate the suspension of liquidation" and to "release any bond or other security." Fagersta contends that in its case, this means that the Department must release all cash deposits from the 2004-05 and 2005-06 administrative reviews and liquidate these entries without regard to antidumping duties. Fagersta notes that the Court of International Trade (CIT) in *Sonco Steel Tube Div. v. United States*, 698 F. Supp. 927, 928 (CIT 1988) ruled that "valid orders must underlie continuing proceedings," and that the CAFC agreed stating in *Asociacion Colombiana de Exportadores v. United States*, 916 F.2d 1571, 1577 (Fed. Cir. 1990) that "without a valid antidumping determination in the original order, there can be no valid determination in a later annual review." Fagersta also points to the CIT's recent decision in *Tembec, Inc. v. United States*, 461 F. Supp. 2d 1355, 1366-67 (CIT 2006) (*Tembec*). Fagersta argues that in that case, the CIT affirmed that the important issue is the "simple fact that there is no longer an antidumping duty order for which to conduct administrative reviews."

Fagersta argues that consistent with the CAFC's holding in *Parkdale Int'l. v. United States*, due to the retrospective nature of the antidumping law, the "prospective" nature of section 129 determinations would apply to all entries that are unliquidated as of the date of implementation of the section 129 determination. Moreover, Fagersta argues that the Department has successfully argued before the WTO that neither the statute nor the SAA preclude the Department from applying a revocation to unliquidated entries made prior to the implementation of a section 129 determination. Fagersta further contends that the Department has the authority to do exactly this, and should exercise this authority. Moreover, Fagersta notes that if the Department were not to exercise its authority, it could be susceptible to a WTO DSU Article 21.5 compliance proceeding. In the alternative, Fagersta requests a changed circumstances review to determine whether to revoke the antidumping duty *ab initio*, terminate any pending administrative reviews, and liquidate any unliquidated entries made by Fagersta without regard to antidumping duties.

Corus, a respondent in the investigation of Certain Hot-Rolled Carbon Steel Flat Products from the Netherlands, Valbruna, a respondent in the investigation of Stainless Steel Bar from Italy, and UGITECH, a respondent in the investigation of Stainless Steel Bar from France, also argue that the Department must liquidate, without regard to antidumping duties, any entries of subject merchandise produced by Corus that are currently suspended. Foroni supports this position in its rebuttal brief. Given the April 9, 2007, deadline for the Department to fully implement, Corus argues, the Department must address the issue of unliquidated entries "forthwith." Corus and Valbruna assert that liquidating suspended entries without regard to antidumping duties is "prospective" in relation to the date of implementation. Therefore, Corus avers, "the Department must consider the revocation of the Dutch Steel AD Order when taking any future actions." Valbruna affirms that "the unliquidated entries of Valbruna's

merchandise should not be subject to final assessment of antidumping duties." Corus and Valbruna also suggest that their position is supported by the Department's implementation of an adverse WTO compliance report with regard to the countervailing duty investigation and first administrative review of Softwood Lumber from Canada. See Additional Memorandum from the United States, *United States-Final CVD Determination with Respect to Certain Softwood Lumber from Canada: Recourse to Article 21.5 of the DSU by Canada*, (October 5, 2005)Like Fagersta, Corus also argues that the Department has successfully argued before a WTO dispute settlement panel that neither the statute nor the SAA preclude it from applying revocation to entries made prior to the implementation of a section 129 determination. Lastly, Corus argues that, were the Department not to terminate any segment of the proceeding based on revocation, that the Department must then recalculate margins by offsetting dumped sales with non-dumped sales.

The European Commission (Commission) makes similar arguments concerning liquidation of entries for exporters whose rates are now calculated to be zero or *de minimis*. Namely, the Commission argues that the Department should liquidate all suspended entries for such exporters without regard to antidumping duties. For cases in which the investigation rate was superseded by an administrative review, the Commission argues that the Department should recalculate the most recent review rate without offsetting dumped sales with non-dumped sales. Also, the Commission argues that the magnitude of dumping considered in any sunset reviews should be calculated without zeroing.

REBUTTAL BRIEFS

The steel and pasta petitioners, Nucor, Mittal USA, and U.S. Steel all argue that the statute, the SAA, and the Department's practice do not permit the Department to apply section 129 determinations to entries made prior to the USTR's imple-

mentation direction. Therefore, these parties contend, the Department may not apply its determination to any unliquidated entries made prior to the implementation date instructed by USTR, nor to any post-investigation administrative reviews. Nor can the Department, these parties contend, calculate any administrative review margins by offsetting dumped sales with non-dumped sales.

Mittal USA affirms that it is the original investigation of Certain-Hot Rolled Carbon Steel Flat Products from the Netherlands that was challenged at the WTO and that it is this investigation specifically that is the subject of this proceeding. Mittal USA argues that assessment rates and current cash deposit rates were determined in administrative reviews. The steel and pasta petitioners argue that Fagersta's reliance on *Tembec* is misplaced because the decision "has been vacated and has no precedential effect."

Nucor argues that Corus' argument is rebutted by the statutory provision establishing the timeline for section 129 determinations by the ITC. Namely, Nucor argues, "the statutory timeline, and the prospective nature of relief, are the same for the ITC's section 129 proceedings, although the statute explicitly states that such proceedings will result in revocation." Nucor and U.S. Steel also argue that Corus' implication that the Department applied the results of its redetermination in Canadian Softwood Lumber are misplaced because in that case, as Nucor argues, "the Department specifically limited actual application of the new margins resulting from the methodology to entries made on or after the Trade Representative's direction." Nucor and U.S. Steel point to other section 129 determinations where the Department specifically limited implementation of its determinations to commence on the date that USTR instructed the Department to do so. Moreover, U.S. Steel notes that the Department has very recently argued for applying its section 129 determinations prospectively before the CAFC, specif-

ically in its response brief submitted to the CAFC on March 6, 2007, in Corus' appeal of the second administrative review.

Department Position:

The Department disagrees that any revocations that result from these section 129 proceedings apply to any entries made prior to the implementation date. Rather, section 129 itself, and the SAA, specifically provide for which entries will be affected by a revocation resulting from a section 129 proceeding.

Section 129(c)(1) of the URAA provides that any determinations made by the Department pursuant to section 129 "shall apply with respect to unliquidated entries of the subject merchandise . . . that are entered, or withdrawn from warehouse, for consumption on or after . . . the date on which the Trade Representative directs the administering authority under subsection (b)(4) of this section to implement that determination."

The SAA confirms the meaning of this language in a situation in which a section 129 proceeding results in the revocation of an order. Specifically, the SAA states, "Under 129(c)(1), if implementation of a WTO report should result in the revocation of an antidumping or countervailing duty order, entries made prior to the date of the Trade Representative's direction would remain subject to potential duty liability." SAA at 1026. Accordingly, pursuant to the statute and the SAA, any revocations resulting from these section 129 proceedings will not apply to entries made before the date of USTR's direction.

The Department disagrees with Fagersta that if the Department revokes an order as a result of these section 129 proceedings, the original determination of sales at less than fair value was invalid, and thus the Department must release all cash deposits currently held and order liquidation without regard to antidumping duties. The original determinations of

sales at less than fair value were made under U.S. law. None of the 12 investigations subject to these section 129 proceedings was found to be invalid under U.S. law. These section 129 proceedings are meant to render the Department's determinations not inconsistent with the panel's findings in *US—Zeroing (EC)*. That panel did not apply U.S. law, but rather considered whether the Department's determinations were inconsistent with the AD Agreement. As such, for each of the section 129 proceedings that result in a revocation of the antidumping order, a determination of sales at less than fair value, valid under U.S. law, remains in place up until the date on which USTR directs the Department to implement the new determinations. Consistent with section 129(c)(1) and the SAA, all entries made prior to this date remain subject to potential liability for antidumping duties.

Apart from confirming that the effect of these section 129 determinations will be prospective only, meaning that they will apply with respect to unliquidated entries made on or after the date on which USTR directs the Department to implement these determinations, the Department is taking no further position in these determinations. Because the treatment of any unliquidated entries made prior to the effective date of these determinations will not be governed by these determinations, such entries will be addressed through separate segments of these proceedings, as appropriate.

Issue 4: Calculation of All-Others Rate

In the Preliminary Results, the Department recalculated the all-others rates based on the recalculated dumping margins for the original respondents. In three investigations, Stainless Steel Bar from France, Stainless Steel from Italy, and Stainless Steel Bar from the United Kingdom, there were no margins remaining that were not based on adverse facts available (AFA) that were above *de minimis*. Therefore, pursuant to Department practice, the Department based the all-others rate on a simple average of the zero/*de minimis* margins

and the AFA margins. The following parties contested this methodology:

1) UGITECH, in the investigation of Stainless Steel Bar from Italy

2) Sandvik Limited, in the investigation of Stainless Steel Bar from the United Kingdom

3) The Commission, in the investigations of Stainless Steel Bar from France, Stainless Steel Bar from Italy, and Stainless Steel Bar from the United Kingdom

4) The Government of the United Kingdom, in the investigation of Stainless Steel Bar from the United Kingdom

5) The Government of France, in the investigation of Stainless Steel Bar from France

All of the above parties take issue with the Department's recalculation of the all-others rate as a simple average of zero or *de minimis* margins and AFA margins. These parties note that 19 U.S.C. 1673d(c)(5)(B) grants the Department the discretion to use a reasonable method to determine the all-others rate in such situations and that the SAA offers a preferred methodology in weight-averaging the zero and *de minimis* margins and margins based on AFA. However, these parties also note that the SAA states that, "if this method is not feasible, or if it results in an average that would not be reasonably reflective of potential dumping margins for non-investigated exporters or producers, Commerce may use other reasonable methods." These parties assert that, in each of the three investigations noted above, the simple averaging methodology is inappropriate because the margins generated by it are not reasonable and not reflective of the potential antidumping margins for non-investigated exporters.

Moreover, the Government of France argues that this methodology is in violation of Article 6.8 and Annex II of the AD

Agreement; the Commission and the Government of the United Kingdom argue that the methodology is "inconsistent with the United States' international obligations," particularly because the Appellate Body has held, in cases where sampling is employed, that Article 9.4 of the AD Agreement prohibits the inclusion of AFA rates in the calculation of the all-others rate. UGITECH argues that the calculation is flawed because the SAA favors a weight average first before a simple average is employed, and because it asserts that the Department erred in setting the below-zero margins of several of the respondents in its all-others rate recalculation to zero. Instead, UGITECH contends that the Department should average the actual negative margins of the respondents, and should not set these margins to zero.

As alternative methodologies, the Government of France argues that the Department should use the original all-others rate of 3.9 percent in the investigation of Stainless Steel Bar from France. The Commission proposes that the all-others rate remain what they were in the original investigations. Sandvik Limited contends that a more reasonable rate would be the current rate of 4.48 percent in the investigation of Stainless Steel Bar from the United Kingdom, a weight-average of Corus' new zero margin shipments and Firth Rixons's 125.77 percent margin shipments during the 2005-06 administrative review; or, leave the 4.48 percent rate in effect until a new Enpar/Firth Rixson rate is determined which could become the new all-others rate at the completion of the pending review. Lastly, UGITECH avers that the Department should not set the respondents' below zero-margins to zero when averaging and should employ a weight average in its calculation of the all-others rate.

REBUTTAL BRIEFS

In their rebuttal briefs, the steel and pasta petitioners argue that the Department's methodology was reasonable and that a respondent may request an administrative review if it believes

the new all-others rate is not reflective of its own rate of dumping. The steel and pasta petitioners point to *Notice of Final Determination of Sales at Less Than Fair Value: Bottle-Grade Polyethylene Terephthalate (PET) Resin From Indonesia*, 70 FR 13456 (March 21, 2005) (*PET Resin from Indonesia*), *Notice of Final Determination of Sales at Less Than Fair Value: Polyethlene Retail Carrier Bags from Malaysia*, 69 FR 34128 (June 18, 2004) (*Bags from Malaysia*), and *Notice of Amended Preliminary Determination of Sales at Less Than Fair Value: Structural Steel Beams from Germany*, 67 FR 4703 (January 31, 2002) as examples in which the Department employed this methodology to generate an all-others rate.

Department Position:

Where the weighted-average dumping margins for all of the individually investigated respondents are zero or *de minimis* or are based on AFA, the Department's practice is to calculate the all other's rate based on a simple average of the zero or *de minimis* margins and the margins based on AFA. *See PET Resin from Indonesia* and *Bags from Malaysia*. The Department finds that it is appropriate to continue to follow its practice in these section 129 proceedings.

This practice is based on the SAA, which states:

> The expected method in such cases will be to weight-average the zero and *de minimis* margins and margins determined pursuant to the facts available, provided that volume data is available. However, if this method is not feasible, or if it results in an average that would not be reasonably reflective of potential dumping margins for non-investigated exporters or producers, Commerce may use other reasonable methods.

SAA at 873.

Regarding UGITECH's argument that the SAA first prescribes that the Department calculate a weighted average, rather than a simple average, of the zero or *de minimis* margins and the margins based on AFA, the Department notes that this is simply not feasible in situations where a margin is based on AFA. In such a situation, the quantity and value information for companies whose margins are based on AFA is not reliable.

The Department further finds unavailing arguments from various parties that the all-others rate should remain unchanged from the original investigation. The very reason for these section 129 proceedings is that the Panel found those margins to be flawed due to the Department's treatment of the non-dumped sales. The Department finds it inappropriate to continue to base the all-other's rate on the very margins that the Department has had to recalculate through these section 129 proceedings.

The Department likewise declines to adopt Sandvik Limited's suggestion to base the calculation of the all-others rate in the investigation of Stainless Steel Bar from the United Kingdom on Corus' new rate, and Enpar/Firth Rixson's rate from the 2005-06 administrative review. First, these two rates come from different time periods. Second, information regarding Enpar/Firth Rixson's 2005-06 administrative review is not on the record of this section 129 proceeding.

Moreover, the Department disagrees with UGITECH that, in calculating the all-others rate, it should use the negative values for those exporters or producers whose weighted-average dumping margin were below zero. Section 735(c)(5)(A) of the Act specifically instructs the Department to exclude "any zero and *de minimis* margins" when calculating the all-others rate. Moreover, both section 735(c)(5)(B) of the Act and the SAA expressly refer to averaging zero, *de minimis* and FA rates. The statute makes no mention of negative weighted-average dumping margins.

Thus, where no weighted-average dumping margins exist other than those which are zero, *de minimis* or based on facts available, the Department is not required to treat negative weighted-average dumping margins as other than zero in calculating the all-others rate. Further, the methodology used is similar to that described in the statute and the SAA.

The Department notes that the new all-others rates will be applied initially as cash deposit rates. The new all-other's rates will not necessarily serve as the assessment rates, if the companies subject to those rates request administrative reviews. Rather, the Department will establish the assessment rates and calculate new, company-specific cash deposit rates through such administrative reviews.

Comment 5: Clerical Error Allegation in the Investigation of Stainless Steel Sheet and Strip in Coils from Italy

TKAST alleges that, in the original margin calculation, the Department incorrectly calculated the U. S. price for certain unreported sales through TKAST's affiliate Ken-Mac. In the original investigation, the Department applied an AFA rate to AST for failing to report 84 U.S. sales made through its affiliate Ken-Mac. The Department allegedly verified the quantity and value of these 84 unreported sales.

For the AFA calculation, the Department applied the highest non-aberrational rate calculated for TKAST's other properly reported U.S. sales (29.83%), to the average unit value (AUV) of TKAST's 84 unreported Ken-Mac sales for a hybrid calculation of the potential uncollected dumping duties (PUDD). TKAST argues that the Department miscalculated the AUV of these unreported sales by inadvertently dividing quantity by value, instead of correctly dividing the value by the quantity. This miscalculation, TKAST alleges, resulted in an overstatement of the total PUDD and ultimately of the final margin. TKAST did not raise this issue as a cler-

ical error or in the litigation subsequent to the original investigation.

Additionally, TKAST argues that the calculation of the highest non-aberrational rate (which is applied to the AUV of the unreported 84 sales and also to the AUV of a group of affiliated downstream sales which could not be verified), should be modified to take into account the Department's new methodology of not zeroing. TKAST maintains that without zeroing, the new highest non-aberrational margin is 14.08%.

Finally, TKAST argues that the Department, pursuant to a remand from the CIT (which was dropped by TKAST prior to the issuance of a final order), recalculated the AUV for its affiliated downstream sales that took into account verified selling expenses and that netted these expenses from the U.S. price. TKAST argues that these expenses should also be deducted from the 84 unreported sales when generating a net price.

In rebuttal, domestic interested parties Allegheny Ludlum and AK Steel Corporation maintain that the Department's new zeroing methodology is not related to the issue of a clerical error that may or may not have existed at the time of the original investigation. Allegheny Ludlum and AK Steel Corporation argue that TKAST does not argue that it was somehow precluded from raising this alleged clerical error during the original investigation. Allegheny Ludlum and AK Steel Corporation argue that the time has passed for the introduction of clerical errors. Allegheny Ludlum and AK Steel Corporation contend that TKAST could have asked for judicial review of this issue at the time of the original investigation and thus should be barred from raising it at this time. If the Department, however, decides to consider this issue, Allegheny Ludlum and AK Steel Corporation contend, the entire record should be opened to allow a comprehensive analysis of TKAST's data, including specifically whether

TKAST engaged in targeted dumping. If the Department considers this issue, Allegheny Ludlum and AK Steel Corporation contend, it should re-open the entire record, delay the final determination and provide all parties with a full and fair opportunity to address all issues related to the calculation of TKAST's dumping margin.

Department Position:

We find that there is a reasonable basis to investigate these allegations further. The Department's goal is to ensure that its recalculations accurately reflect its methodological choices. The Department is not reconsidering any of those methodological choices other than to apply the Final Modification. To ensure all parties have access to the information needed to analyze this issue, we are postponing our decision with respect to stainless steel sheet and strip in coils from Italy and placing further information on the record. We will announce a further schedule for comments once this additional information is placed on the record.

Comment 6: Clarification of Valbruna Exporter Name

Valbruna argues that the Department should use the name Acciaierie Valbruna S.p..A. and not Acciaierie Valbruna S.r.l. in its final results of this proceeding and in any liquidation instructions sent to U.S. Customs and Border Protection. Valbruna argues that the Department has previously recognized that Valbruna's name was changed from Acciaierie Valbruna S.r.l. to Acciaierie Valbruna S.p.A.

Department Position:

We agree with Valbruna that the customs instructions should reflect the name Acciaierie Valbruna S.p.A. In the investigation, the *Federal Register* notices all reflect the old name. However, all the customs instructions reflect the new name for cash deposit purposes. Also, letters sent to Valbruna's counsel during the investigation were addressed using the

new name. The Department performed a changed circumstances review for Valbruna in the stainless steel wire rod from Italy case and found that Acciaierie Valbruna S.p.A. was the successor-in-interest to Acciaierie Valbruna S.r.l. *See Stainless Steel Wire Rod from Italy: Notice of Final Results of Changed Circumstances Antidumping Duty Review*, 71 FR 24643 (April 26, 2006).

Comment 7: The Department's Briefing Schedule

IPSCO, Steel Dynamics and Gallatin argue that the "Department's limited briefing schedule chills U.S. producers' due process rights." IPSCO, Steel Dynamics and Gallatin note that the Department issued its preliminary determinations in these proceedings only four days after issuing its initiation notice. Moreover, IPSCO, Steel Dynamics and Gallatin note, parties were only afforded 15 days to submit comments on the preliminary determinations. This short time period, IPSCO, Steel Dynamics and Gallatin assert, especially given the magnitude of the Department's change in methodology, "gives the appearance that the Department is attempting to sweep its highly questionable new offset practice under the rug without a full hearing of the issues."

Department Position:

The Department's change in methodology has been the result of a long, deliberative process that did not begin with the initiation notice of these 129 proceedings. Instead, this process dates to March 6, 2006, when the Department published a notice in the *Federal Register* proposing that it would no longer make average-to-average comparisons without providing offsets for non-dumped comparisons. *See* 71 FR 11189. In that notice, the Department solicited comments on its proposed change in methodology. The Department received numerous comments, which it carefully considered prior to publishing the Final Modification notice on December 27, 2006.

As the Department stated when it initiated these section 129 proceedings, its sole intention was to recalculate the dumping margins using the methodology described in the Final Modification. *Implementation of the Findings of the WTO Panel in US Zeroing (EC): Notice of Initiation of Proceedings Under Section 129 of the URAA; Opportunity to Request Administrative Protective Orders; and Proposed Timetable and Procedures*, 72 FR 9306 (March 1, 2007). The Department, therefore, has given the parties to these proceedings sufficient time to comment on the application of the Final Modification to the investigations subject to these section 129 proceedings.

FINAL ANTIDUMPING MARGINS

The recalculated margins, unchanged from the Preliminary Results for all cases, except the investigation of Stainless Steel Sheet and Strip in Coils from Italy, are as follows:

1) Certain Hot-Rolled Carbon Steel from the Netherlands

   - The margin for Corus, the sole respondent, decreases from 2.59 percent to zero. Since Corus was the only respondent in the investigation, this order will be revoked.

2) Stainless Steel Bar from France

   - The margin for UGITECH decreases from 3.9 percent to zero. This order will be revoked for UGITECH.
   - The margin for Aubert and Duval S.A. was based on total AFA. This margin does not change as a result of this proceeding.
   - Since there are no non-AFA, above *de minimis* margins remaining, pursuant to Department practice, the all others rate is based on a simple average of the zero margins and the AFA margins.

Therefore, the all-others rate changes from 3.9 percent to 35.92 percent.

3) Stainless Steel Bar from Germany

- The margin for BGH decreases from 13.63 percent to 2.59 percent.
- The margin for Einsal decreases from 4.17 percent to *de minimis*. The order will be revoked for Einsal.
- The margin for Edelstahl Witten-Krefeld GmbH decreases from 15.40 percent to 10.82 percent.
- The margin for Krupp Edelstahlprofile GmbH decreases from 32.32 percent to 31.25 percent.
- The all-others rate changes from 16.96 percent to 15.16 percent.

4) Stainless Steel Bar from Italy

- The margin for Acciaiera Valbruna S.p.A. decreases from 2.50 percent to zero. This order will be revoked for Acciaiera Valbruna S.p.A.
- The margin for Acciaiera Foroni S.p.A. decreases from 7.07 percent to zero. The order will be revoked for Acciaiera Foroni S.p.A.
- Trafilerie Bedini S.r.l. was excluded from the order and that does not change as a result of this proceeding.
- The margin for Cogne Acciai Speciali Srl was based on total AFA. This margin does not change as a result of this proceeding.
- The margin for Rodacciai S.p.A. decreases from 3.83 percent to zero. The order will be revoked for Rodacciai S.p.A.
- Since there are no non-AFA above *de minimis* margins remaining, pursuant to Department practice, the all-others rate is based on a simple average of the zero margins and the AFA margins.

Therefore, the all-others rate changes from 3.81 percent to 6.60 percent.

5) Stainless Steel Bar from the United Kingdom

- The margin for Corus Engineering Steels Ltd. Decreases from 4.48 percent to zero. The order will be revoked for Corus Engineering Steels Ltd.
- Firth Rixon Special Steels Ltd. and Crownridge Stainless Steel Ltd.'s s/Valkia Ltd.'s margins were based on total AFA. These margins do not change as a result of this proceeding.
- Since there are no non-AFA above *de minimis* margins remaining, pursuant to Department practice, the all-others rate is based on a simple average of the zero margins and the AFA margins. Therefore, the all-others rate changes from 4.48 percent to 83.85 percent.

6) Stainless Steel Wire Rod from Sweden

- The margin for Fagersta Stainless AB decreases from 5.71 percent to zero. Since Fagersta Stainless AB was the only respondent in the investigation, this order will be revoked.

7) Stainless Steel Wire Rod from Spain

- The margin for Roldan S.A., the sole respondent, decreases from 4.76 percent to 2.71 percent.
- The all-others rate changes from 4.76 percent to 2.71 percent.

8) Stainless Steel Wire Rod from Italy

- The margin for Cogne Acciai Speciali S.r.l. decreases from 12.73 percent to 11.25 percent.
- Acciaiera Valbruna S.p.A. was excluded from the order and that does not change as a result of this proceeding.

- The all-others rate changes from 12.73 percent to 11.25 percent.

9) Stainless Steel Plate in Coils from Belgium

- The margin for Ugine & ALZ Belgium (formerly ALZ N.V.), the sole respondent, decreases from 9.84 percent to 8.54 percent.
- The all-others rate changes from 9.84 percent to 8.54 percent.

10) Certain Cut-To-Length Carbon-Quality Steel Plate Products from Italy

- The margin for Palini and Bertoli S.p.A. decreases from 7.85 percent to 7.64 percent.
- ILVA S.p.A. was excluded from the order and that does not change as a result of this proceeding.
- The all-others rate changes from 7.85 percent to 7.64 percent.

11) Certain Pasta from Italy

- The margin for Arrighi S.p.A. Industrie Alimentari decreases from 21.34 percent to 20.84 percent.
- The margin for Liguori Pastificio Dal 1820 S.p.A. decreases from 12.41 percent to 12.14 percent.
- The margin for Pastificio Fratelli Pagani S.p.A. decreases from 18.30 percent to 18.23 percent.
- The margin for La Molisana Industrie Alimentari S.p.A. remains at 14.78 percent based on this recalculation.
- De Matteis Agroalimentare S.p.A. and Delverde S.r.l. were excluded from the order and that does not change as a result of this proceeding.
- F.lli De Cecco de Filippo Fara San Martino S.p.A.'s margin was based on total AFA. This margin does not change as a result of this proceeding.

- The all-others rate changes from 12.09 percent to 16.51 percent. We note that Delverde S.r.l.'s margin in the investigation was a component of the all-others rate. However, since Delverde S.r.l. was later revoked from the order as a result of litigation relating to the investigation, its margin is no longer a component of the all-others rate. We note also that, for cash deposit purposes, we deduct from the margin of dumping any export subsidies. On that basis, the new cash deposit rate that will be established for all-others is 15.45 percent.

Additional Comments from the EC

The EC also argued that the United States needs to undertake section 129 proceedings with respect to the challenged administrative reviews and made certain suggestions about how such proceedings should occur. Such comments are beyond the scope of the present section 129 proceedings and the Department will not otherwise address them in these proceedings.

RECOMMENDATION

In light of the Panel's report, we recommend implementing the recommendations and rulings of the DSB by applying the methodology in the Final Modification, and adopting the above recalculations.

Agree _____ Disagree _____

_____
David M. Spooner
Assistant Secretary
for Import Administration

_____
Date

APPENDIX C

FEDERAL REGISTER

Vol. 72, No. 098

Notices

DEPARTMENT OF COMMERCE (DOC)

International Trade Administration (ITA)

Import Administration

[A-421-807]

Certain Hot-Rolled Carbon Steel Flat Products from the Netherlands; Final Results of Antidumping Duty Administrative Review

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72 FR 28676

DATE: Tuesday, May 22, 2007

SUMMARY: On December 11, 2006, we published in the Federal Register the preliminary results of this administrative review. *See Certain Hot-Rolled Carbon Steel Flat Products from the Netherlands; Preliminary Results of Antidumping Duty Administrative Review*, 71 FR 71523 (December 11, 2006) (*Preliminary Results*). This review covers imports of subject merchandise from Corus Staal BV (Corus Staal) to the United States during the period November 1, 2004, to October 31, 2005. Based on our analysis of the comments received, we have made changes to the margin calculation. However, the final results do not differ from the preliminary results. The final weighted-average dumping margin for the reviewed firm is listed below in the section entitled "Final Results of Review."

EFFECTIVE DATE: May 22, 2007.

FOR FURTHER INFORMATION CONTACT: David Cordell or Robert James, AD/CVD Operations, Office 7, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, DC 20230, telephone: (202) 482-0409 or (202) 482-0649, respectively.

SUPPLEMENTARY INFORMATION: On December 11, 2006, we published in the Federal Register the preliminary results of this administrative review. *See Preliminary Results.* In response to the Department's invitation to comment on the preliminary results of this review, Corus (respondent) and domestic interested party Mittal Steel USA Inc. (Mittal Steel) filed case briefs on January 17, 2007. Corus, Mittal Steel and petitioner United States Steel Corporation (U.S. Steel) submitted rebuttal briefs on January 24, 2007, and on January 25, 2007, domestic interested party Nucor Corporation (Nucor) filed a rebuttal brief. On March 23, 2007, the Department extended the final results by 35 days. *See Certain Hot-Rolled Carbon Steel Flat Products from the Netherlands; Antidumping Duty Administrative Review; Extension of Time Limit*, 72 FR 13744 (March 23, 2007).

On May 4, 2007, Corus submitted a request for the Department to rescind the review in light of the Department's *Final Results for the Section 129 Determination: Certain Hot-rolled Carbon Steel from the Netherlands* (April 9, 2007) and the U.S. Trade Representative's instructions to the Department to implement those findings under Section 129 of the Uruguay Round Agreements Act. *See Implementation of the Findings of the WTO Panel in US-Zeroing (EC): Notice of Determinations under Section 129 of the Uruguay Agreements Act and Revocations and Partial Revocations of Certain Antidumping Duty Orders*, 72 FR 25, 261 (May 4, 2007). On May 11, 2007, Mittal Steel and Nucor submitted responses to Corus Staal's request. The request for rescission is well past the deadline for such requests and furthermore Corus Staal itself did not request

the review, thus making it ineligible to request rescission. *See* 19 CFR 351.213(d)(1). Corus' arguments regarding the section 129 determination are addressed in the Issues and Decisions Memorandum, (Decision Memorandum) which accompanies this Notice, at issue 4.

Period of Review

The period of review (POR) is November 1, 2004, to October 31, 2005.

Scope of the Order

For purposes of this order, the products covered are certain hot-rolled carbon steel flat products of a rectangular shape, of a width of 0.5 inch or greater, neither clad, plated, nor coated with metal and whether or not painted, varnished, or coated with plastics or other non-metallic substances, in coils (whether or not in successively superimposed layers), regardless of thickness, and in straight lengths, of a thickness of less than 4.75 mm and of a width measuring at least 10 times the thickness. Universal mill plate *(i.e.*, flat-rolled products rolled on four faces or in a closed box pass, of a width exceeding 150 mm, but not exceeding 1250 mm, and of a thickness of not less than 4.0 mm, not in coils and without patterns in relief) of a thickness not less than 4.0 mm is not included within the scope of the order. Specifically included within the scope of this order are vacuum degassed, fully stabilized (commonly referred to as interstitial-free (IF)) steels, high strength low alloy (HSLA) steels, and the substrate for motor lamination steels. IF steels are recognized as low carbon steels with micro-alloying levels of elements such as titanium or niobium (also commonly referred to as columbium), or both, added to stabilize carbon and nitrogen elements. HSLA steels are recognized as steels with micro-alloying levels of elements such as chromium, copper, niobium, vanadium, and molybdenum. The substrate for motor lamination steels

contains micro-alloying levels of elements such silicon and aluminum.

Steel products to be included in the scope of this order, regardless of definitions in the Harmonized Tariff Schedule of the United States (HTS), are products in which: (i) iron predominates, by weight, over each of the other contained elements; (ii) the carbon content is 2 percent or less, by weight; and (iii) none of the elements listed below exceeds the quantity, by weight, respectively indicated:

1.80 percent of manganese, or

2.25 percent of silicon, or

1.00 percent of copper, or

0.50 percent of aluminum, or

1.25 percent of chromium, or

0.30 percent of cobalt, or

0.40 percent of lead, or

1.25 percent of nickel, or

0.30 percent of tungsten, or

0.10 percent of molybdenum, or

0.10 percent of niobium, or

0.15 percent of vanadium, or

0.15 percent of zirconium.

All products that meet the physical and chemical description provided above are within the scope of this order unless otherwise excluded. The following products, by way of example, are outside or specifically excluded from the scope of this order:

- Alloy hot-rolled steel products in which at least one of the chemical elements exceeds those listed above

(including, *e.g.*, ASTM specifications A543, A387, A514, A517, A506).

- Society of Automotive Engineers (SAE)/American Iron and Steel Institute (AISI) grades of series 2300 and higher.
- Ball bearings steels, as defined in the HTS.
- Tool steels, as defined in the HTS.
- Silico-manganese (as defined in the HTS) or silicon electrical steel with a silicon level exceeding 2.25 percent.
- ASTM specifications A710 and A736.
- USS Abrasion-resistant steels (USS AR 400, USS AR 500).
- All products (proprietary or otherwise) based on an alloy ASTM specification (sample specifications: ASTM A506, A507).
- Non-rectangular shapes, not in coils, which are the result of having been processed by cutting or stamping and which have assumed the character of articles or products classified outside chapter 72 of the HTS.

The merchandise subject to this order is classified in the HTS at subheadings: 7208.10.15.00, 7208.10.30.00, 7208.10.60.00, 7208.25.30.00, 7208.25.60.00, 7208.26.00.30, 7208.26.00.60, 7208.27.00.30, 7208.27.00.60, 7208.36.00.30, 7208.36.00.60, 7208.37.00.30, 7208.37.00.60, 7208.38.00.15, 7208.38.00.30, 7208.38.00.90, 7208.39.00.15, 7208.39.00.30, 7208.39.00.90, 7208.40.60.30, 7208.40.60.60, 7208.53.00.00, 7208.54.00.00, 7208.90.00.00, 7211.14.00.90, 7211.19.15.00, 7211.19.20.00, 7211.19.30.00, 7211.19.45.00, 7211.19.60.00, 7211.19.75.30, 7211.19.75.60, and 7211.19.75.90. Certain hot-rolled flat-rolled carbon steel flat products covered by this order, including: vacuum degassed fully stabilized; high

strength low alloy; and the substrate for motor lamination steel may also enter under the following tariff numbers: 7225.11.00.00, 7225.19.00.00, 7225.30.30.50, 7225.30.70.00, 7225.40.70.00, 7225.99.00.90, 7226.11.10.00, 7226.11.90.30, 7226.11.90.60, 7226.19.10.00, 7226.19.90.00, 7226.91.50.00, 7226.91.70.00, 7226.91.80.00, and 7226.99.00.00. Subject merchandise may also enter under 7210.70.30.00, 7210.90.90.00, 7211.14.00.30, 7212.40.10.00, 7212.40.50.00, and 7212.50.00.00. Although the HTS subheadings are provided for convenience and U.S. Customs purposes, the written description of the scope of this order is dispositive.

Analysis of Comments Received

All issues raised in the case and rebuttal briefs by parties to this administrative review are addressed in the Decision Memorandum from Stephen J. Claeys, Deputy Assistant Secretary for AD/CVD Operations, to David M. Spooner, Assistant Secretary for Import Administration, dated May 15, 2007, which is hereby adopted by this notice. A list of the issues which parties have raised and to which we have responded, all of which are in the Decision Memorandum, is attached to this notice as an appendix. Parties can find a complete discussion of all issues raised in this review and the corresponding recommendations in this public memorandum, which is on file in the Central Records Unit, room B-099 of the main Department building. In addition, a complete version of the Decision Memorandum can be accessed directly via the Internet at *www.ia.ita.doc.gov*. The paper copy and electronic version of the Decision Memorandum are identical in content.

Duty Absorption

In the *Preliminary Results*, the Department found that Corus Staal absorbed antidumping duties on all U.S. sales in accordance with section 751(a)(4) of the Tariff Act of 1930, as amended (the Tariff Act). Corus Staal has failed to provide

evidence that the unaffiliated customers in the United States will pay the full duty ultimately assessed on the subject merchandise. *See* Comment 6 of the Issues and Decisions Memorandum. Thus, for the final results of this review, we continue to find that Corus Staal absorbed antidumping duties.

Changes Since the Preliminary Results

Based on our analysis of the comments received, we have made the following changes to the margin calculation:

- We corrected a clerical error that erroneously compared U.S. control numbers to comparison market product codes.
- We corrected a clerical error involving the CEP profit rate.

These changes are discussed in the relevant sections of the Decision Memorandum.

Final Results of Review

We determine that the following weighted-average percentage margin exists for the period November 1, 2004, to October 31, 2005:

Manufacturer/Exporter	Weighted Average Margin (percentage)
Corus Staal BV	2.52

Assessment

The Department shall determine, and the CBP shall assess, antidumping duties on all appropriate entries. In accordance with 19 CFR 351.212(b)(1), we have calculated importer-specific assessment rates for the merchandise based on the ratio of the total amount of antidumping duties calculated for the examined sales made during the POR to the total customs value of the sales used to calculate those duties. The Department will issue appropriate *ad valorem* assessment instruc-

tions directly to CBP 15 days after publication of these final results of review. We will direct CBP to assess the resulting assessment rate against the entered customs values for the subject merchandise on each of the importer's entries during the POR.

Cash Deposit Requirements

On May 4, 2007, the Department published a FR notice that, *inter alia,* revoked this order, effective April 23, 2007. *See Implementation of the Findings of the WTO Panel in US—Zeroing (EC): Notice ofDeterminations Under Section 129 of the Uruguay Round Agreements Act and Revocations and Partial Revocations of Certain Antidumping Duty Orders*, 72 FR 25,261 (May 4,2007). Therefore, there is no need to issue new cash deposit instructions for this administrative review.

Notification to Interested Parties

This notice also serves as a final reminder to importers of their responsibility under 19 C.F.R. § 351.402(f)(2) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in the Secretary's presumption that reimbursement of the antidumping duties occurred and the subsequent assessment of double antidumping duties.

This notice also serves as a reminder to parties subject to administrative protective orders (APOs) of their responsibility concerning the disposition of proprietary information disclosed under APO in accordance with 19 C.F.R. § 351.305, that continues to govern business proprietary information in this segment of the proceeding. Timely written notification of the return or destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and the terms of an APO is a sanctionable violation.

This determination is issued and published in accordance with sections 751(a)(1) and 777(i)(1) of the Act.

Dated: May 15, 2007.

David M. Spooner,

Assistant Secretary for Import Administration.

Appendix—Issues in Decision Memorandum

1. Simplified Reporting and Further-Manufactured Imports
2. G&A expenses
3. Constructed Export Price (CEP) Profit Rate
4. Offsetting Dumped Sales with Non-Dumped Sales
5. Classification of JIT Deliveries as CEP Sales
6. Duty Absorption
7. Warranty Expenses
8. Clerical Errors

APPENDIX D

* * * FOR YOUR CONVENIENCE LEXIS HAS INCLUDED THE UNPUBLISHED DECISION MEMORANDUM HERE * * *

A-421-807
POR: 11/01/2004-10/31/2005
AD/CVD Operations, O7: DC, DS
Public Document

MEMORANDUM: David M. Spooner Assistant Secretary for Import Administration

FROM: Stephen Claeys Deputy Assistant Secretary for AD/CVD Operations

SUBJECT: Issues and Decision Memorandum for the 2004-2005 Administrative Review of Certain Hot-Rolled Carbon Steel Flat Products from the Netherlands; Final Results of Antidumping Duty Administrative Review

Summary

We have analyzed the case and rebuttal briefs of interested parties in the 2004-2005 administrative review of the antidumping duty order on certain hot-rolled carbon steel flat products (hot-rolled steel) from the Netherlands. As a result of our analysis, we have made changes to the margin calculation as discussed below. We recommend that you approve the positions described in the "Discussion of the Issues" section of this memorandum. Below is the complete list of the issues in this review for which we received comments and rebuttal comments by parties:

1. Simplified Reporting and Further-Manufactured Imports
2. G&A expenses

3. Constructed Export Price (CEP) Profit Rate

4. Offsetting Dumped Sales with Non-Dumped Sales

5. Classification of JIT Deliveries as CEP Sales

6. Duty Absorption

7. Warranty Expenses

8. Clerical Errors

Background

On December 11, 2006, we published in the Federal Register the preliminary results of this administrative review. See Certain Hot-Rolled Carbon Steel Flat Products from the Netherlands; Preliminary Results of Antidumping Duty Administrative Review, 71 FR 71523 (December 11, 2006) (Preliminary Results). The period of review (POR) is November 1, 2004, through October 31, 2005.

This review covers sales of certain hot-rolled steel made by one manufacturer/exporter, Corus Staal BV (Corus). We invited parties to comment on our preliminary results. We received case briefs from Corus and domestic interested party Mittal Steel USA Inc. (Mittal Steel) on January 17, 2007. On January 24, 2004, we received rebuttal briefs from Corus, Mittal Steel and petitioner United States Steel Corporation (U.S. Steel). On January 25, 2007, domestic interested party Nucor Corporation (Nucor) filed a rebuttal brief.

Discussion of the Issues

1. Simplified Reporting and Further-Manufactured Imports

Mittal Steel renews its objections to the Department's use of "simplified reporting" for Corus' imports that were further manufactured by affiliates. According to Mittal Steel, once the Department has determined the value added in the United States to imports of subject merchandise is likely to exceed substantially the value of those imports, the Department's

subsequent decision to use identical or similar subject merchandise to calculate a margin for the further-manufactured imports is dependent upon two factors. Mittal Steel states those two factors are (1) whether there is a sufficient quantity of sales to provide a reasonable basis for comparison and (2) whether it is appropriate to use such sales, citing Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From Japan, and Tapered Roller Bearings, Four Inches or Less in Outside Diameter, and Components Thereof, From Japan; Final Results of Antidumping Duty Administrative Reviews (TRBs from Japan), 63 FR 2558, 2561. Further citing TRBs from Japan, Mittal Steel claims the Department also must examine whether the use of any proxy produces accurate results.

Mittal Steel states that prior to the preliminary results of this review, it urged the Department to collect additional data on Corus' further-manufactured U.S. imports and to base the dumping margin on those data. Mittal Steel asserts the preliminary results confirm the need for the Department to obtain additional data, and that the Department is legally required to do so in order to calculate the most accurate margin possible.

Mittal Steel states it used information on the record to create a U.S. sales database of further-manufactured products and then used this database to estimate a margin for Corus' further-manufactured imports. Specifically, Mittal Steel contends that it used the information regarding Corus' further-manufactured imports in Exhibit A-30 of Corus' April 28, 2006, supplemental questionnaire response (SQR) to determine the product code, physical characteristics, quantity, gross unit price, and entered value of the further-manufactured imports. See Mittal Steel Case Brief at 4. Mittal Steel also describes how it used other information on the record to derive an amount for certain adjustments to U.S. price and to set the values for other fields. *Id.* at 4-5. To determine the

cost of further manufacturing, Mittal Steel states it subtracted the cost of the imported inputs from the sales price of the finished products in Exhibit A-30 of Corus' April 28, 2006, SQR, divided this amount by the finished product quantity sold in Exhibit A-30, and then multiplied the result by 0.80. Mittal Steel claims that this calculation results in a conservative estimate of further manufacturing costs when one considers the total sales value of further manufactured goods reported in Exhibit A-30 and certain information in the financial statements of Thomas Steel Strip (Thomas) and Hille and Mueller U.S.A. (Corus' further-manufacturing subsidiaries). Mittal Steel states it then ran a modified version of the Department's margin program using its created database of U.S. further manufactured sales and its computed further manufacturing costs, which resulted in a significant dumping margin for Corus' further-manufactured exports.

Mittal Steel argues that another approach for determining margins for further-manufactured imports under the special rule is identified in the Statement of Administrative Action, Uruguay Round Agreements Act, H.Doc 316, Vol. 1, 103d Cong. 2d Sess. 656 (1994) (SAA). Mittal Steel holds the Department may calculate constructed export price (CEP) based on the price paid to the exporter or producer by the affiliated person for the subject merchandise, if Commerce determines that such a price is appropriate. See Mittal Steel's Case Brief at 8, quoting the SAA at 826. Citing Antidumping Duties; Countervailing Duties; Final Rule (Final Rule), 62 FR 27295, 27353 (May 19, 1997), Mittal Steel claims the Department noted it was reasonable to rely on transfer prices to determine the applicability of the special rule because of the possible use of transfer prices to determine a margin for further-manufactured sales. See Mittal Steel Case Brief at 8 (emphasis Mittal Steel). To implement this approach, Mittal Steel states it took the U.S. sales database it created, changed the sales type (SALEU) from CEP to export price (EP), and set gross unit price (GRSUPRU) equal to the price of the

further-manufactured imports, i.e., the transfer prices from Corus to its affiliated importer.

Mittal Steel contends the results of both of these analyses demonstrate that the Department should collect additional data on Corus' further-manufactured imports and calculate a margin using those data. Mittal Steel asserts that the statute allows the Department to calculate a margin for further-manufactured imports using a surrogate only if it is appropriate to do so, and citing *Rhone Poulenc, Inc. v. United States*, 899 F.2d 1185, 1191 (Fed. Cir. 1990), argues the statute requires the Department to calculate margins as accurately as possible. Therefore, Mittal Steel contends, the Department must consider this in deciding whether it is appropriate to use the margin calculated for non-further-manufactured sales as a proxy for further-manufactured imports.

Corus responds that Mittal Steel essentially is asking the Department to depart from its regulations by requiring Corus to provide full reporting of its sales of further-manufactured imports in order to justify the use of simplified reporting. Corus refers to the Department's June 15, 2006, A Memorandum Regarding Simplified Reporting and Value Added in the United States by Thomas Steel (Value Added Memorandum) at 4 in which the Department preliminarily found the value added in the United States was likely to exceed substantially the value of the imported subject merchandise. The Department also concluded there was a sufficient quantity of sales to provide a reasonable basis for comparison under section 772(e) of the Tariff Act of 1930, as amended (the Tariff Act), and preliminarily found Corus' simplified reporting of sales to Thomas to be appropriate. Corus claims the Department properly concluded that Corus met the statutory criteria, and asserts Mittal Steel does not contest the Department's finding that Corus met these statutory criteria. According to Corus, Mittal Steel's only argument is that there

is a statutory requirement that the margin selected as a proxy produce the most accurate results. Corus further asserts that Mittal Steel construes this requirement as meaning the Department cannot employ the margin determined for other imports if it knows or has reasonable grounds to believe that the use of such margin will not produce the most accurate results possible. See Corus Rebuttal Brief at 4, quoting Mittal Steel Case Brief at 3. Corus contends Mittal Steel's statement is unsupported by the statute or the regulations and cites the Final Rule at 27354, in which the Department stated the burden of performing value-added calculations far outweighed any increase in accuracy achieved by such calculations.

Corus asserts Mittal Steel's arguments amount to nothing more than margin shopping. Referring to Mittal Steel's letters of March 22, 2006, at 6, May 12, 2006, at Exhibit 1, and May 15, 2006, at Exhibits 2 and 3 and Mittal Steel's Case Brief at 7 and 9, Corus lists the margins Mittal Steel has calculated throughout this proceeding and claims these margins show the inaccuracies of Mittal Steel's methodologies. According to Corus, these margins illustrate the fragility of such calculations and their absolute dependence on the assumptions and speculations made in deriving the result. See Corus Rebuttal Brief at 5. Corus claims the arguments raised in Mittal Steel's case brief are no more valid than those in Mittal Steel's earlier submissions, and argues the margin calculation methodology used in Mittal Steel's case brief was similar to the approach used in Mittal Steel's earlier submissions that resulted in margins varying by nearly 100 percentage points. Corus argues using the Department's programs and some of Corus' data coupled with numerous assumptions to calculate margins does not render the resulting margins legitimate and accurate.

Corus contends that accurately backing out further-manufacturing costs from the finished product would be very complex, a burden to the Department, and create less accurate

results. Corus argues the instant case differs from TRBs from Japan, because the further-manufactured material in the instant case is not of the same class or kind of merchandise as the subject merchandise and the Department has never computed margins for further-processed material in prior reviews of hot-rolled steel from the Netherlands. Corus asserts the further-processed material in this case consists mainly of specialized cold-rolled, heat-treated, electroplated and slit steel strip used by battery can makers. Corus argues reporting and analyzing these data would be extremely burdensome and would cancel the benefits to be derived from simplified reporting. Corus argues the acceptance of Mittal Steel's suggestion for full reporting could open the floodgates in a manner that would negate the the statutory provision for simplified reporting. See Corus Rebuttal Brief at 7. Therefore, Corus urges the Department to accept Corus' reporting of Thomas's further-manufactured sales using the simplified reporting methodology.

Department's Position:

The "special rule" for merchandise with value added after importation is defined by section 772(e) the Act as:

> Where the subject merchandise is imported by a person affiliated with the exporter or producer, and the value added in the United States by the affiliated person is likely to exceed substantially the value of the subject merchandise, the administering authority shall determine the constructed export price for such merchandise by using one of the following prices if there is a sufficient quantity of sales to provide a reasonable basis for comparison, and the administering authority determines that the use of such sales is appropriate:
>
> (1) The price of identical subject merchandise sold by the exporter or producer to an unaffiliated person.
>
> (2) The price of other subject merchandise sold by the exporter or producer to an unaffiliated person.

> If there is not sufficient quantity of sales to provide a reasonable basis for comparison under paragraph (1) and (2), or the administering authority determines that neither of the prices described in such paragraphs is appropriate, then the constructed export price may be determined on any other reasonable basis.

Also, 19 CFR 351.402(c)(2) defines "exceed substantially" as meaning the value added in the United States is at least 65 percent of the price charged to the first unaffiliated purchaser for the merchandise as sold in the United States.

In this case, Corus has demonstrated, and petitioner has not questioned, that the sales in question meet the statutory and regulatory provisions governing the "special rule." Thus, the Department is satisfied the value added is at least 65 percent of the imported subject merchandise and that there is a sufficient quantity of sales to provide a reasonable basis for comparison. We find Mittal's suggestion that we should use transfer prices to be moot, as we have determined the sales to be representative and the value added to be sufficient.

The Department agrees that in this case the further-manufactured material is not of the same class or kind of merchandise as the subject merchandise as it consists mainly of specialized cold-rolled, heat-treated, electroplated and slit steel strip used by battery can makers. However, the Department disagrees with Corus's assertion that reporting these data would be extremely burdensome and would cancel the benefits to be derived from simplified reporting.

The intent of the special rule is to ease the administrative burden for the Department, as the SAA clearly indicates. Moreover, the SAA makes clear that the intent behind the special rule is that "Commerce not be required to perform a precise calculation of the value added. Requiring such a precise calculation would defeat the purpose of the new rule of saving Commerce the considerable effort of measuring precisely the U.S. value added."

Thus, for the reasons outlined in the Value Added Memorandum, and for the reasons outlined above, the Department has not changed its position with respect to these further manufactured imports.

2: General and Administrative (G&A) Expenses

Mittal Steel claims that Corus underreported its G&A expenses through its calculation methodology. Citing Corus' September 8, 2006, SQR at 6-7, Mittal Steel claims Corus shows how its reported G&A expenses approximate the G&A expenses apportioned to its production lines through the budgeting process. Mittal Steel states respondent's calculation goes against the Department's practice of using company-wide G&A expenses to compute a G&A expense rate. Mittal Steel argues that Corus should have reconciled its reported G&A expenses to the total overall G&A expenses for Corus' hot-rolled steel producing entities. Mittal Steel argues those overall G&A expenses should be used to compute its G&A expense rate. However, Mittal Steel suggests that alternatively, the Department could use Corus's total other operating costs from its financial statements to represent Corus' total G&A expenses in the G&A expense ratio calculation.

Corus disagrees with Mittal Steel's allegations. First, respondent contends that Mittal Steel has inappropriately compared two disparate sets of figures: an "other operating cost" expense ratio, from Corus' financial statements, and the reported G&A expenses for entities producing hot-rolled steel. Corus argues this comparison is totally without merit because other operating costs do not equate to G&A expenses.

Second, Corus refutes Mittal Steel's allegation that it has understated its G&A expenses by deviating from the Department's normal G&A expense rate calculation methodology. Corus asserts it appropriately computed its G&A

expense rate and that it allocated G&A expenses to subject merchandise based on the company's total cost of goods sold for companies producing hot-rolled steel, including Corus Staal BV (i.e., the respondent company), CNBV, and the headquarter's expenses incurred by Corus Group (i.e., overall parent company). Corus contends this methodology has been fully verified in past proceedings and, aside from an overstatement of G&A expenses on respondent's own part, the methodology has not been adjusted by the Department in the past. For these reasons, Corus insists the Department should continue to accept its reported costs, including the G&A expenses.

Department's Position:

In the instant case, Corus reported G&A expenses inclusive of its own administrative costs and portions of the administrative costs of its parent companies, CNBV and Corus Group. With regard to the specific amounts, Corus provided detailed supporting documents to explain the amounts included in its total G&A expense figure. For example, the amount of Corus Group's total G&A expenses to be allocated over its cost of goods sold was presented in a worksheet that detailed Corus Group's total operating costs by type of cost, which were reconciled to the financial statements. In that schedule, Corus showed line by line which costs were G&A expenses. Using that total G&A expense figure, Corus computed the amount that should be included in its reported G&A expenses. Accordingly, we are accepting Corus' calculated G&A expense rate based on its unconsolidated financial statements, including an allocated portion of its parent companies' G&A expenses, for the final results. See, e.g., Final Determination in the Antidumping Investigation of Light-Walled Rectangular Pipe and Tube from Mexico, 69 FR 53677 (September 2, 2004) and accompanying Issues and Decision Memorandum at Comment 25, where the Department described its practice of calculating a respondent

company's G&A expense rate based on the respondent company's unconsolidated financial statements, while also including a portion of the parent company's G&A expenses.

3: Constructed Export Price (CEP) Profit Rate

Referring to section 772(f)(2)(C) of the Tariff Act and Calculation of Profit for Constructed Export Price Transactions, Import Administration Policy Bulletin No. 97/1 (September 4, 1997) (Policy Bulletin 97/1), Mittal Steel notes the Department typically calculates the CEP profit rate based on the reported expenses where such data is available. Where such data are not available, the Department bases the CEP profit rate on the profits and expenses incurred in relation to the narrowest category of merchandise which includes the subject merchandise sold in the United States and the exporting country (or sold in all countries when country-specific data are not available). Comparing the CEP profit rate calculated in the preliminary results to the profit rates derived from the income statements of Corus Staal BV and Corus Strip Products IJmuiden (CSPY), Mittal Steel claims the accuracy of Corus' reported expenses in the instant review is questionable.[1]

In relation to Mittal Steel's argument regarding Corus' CEP profit, petitioner suggests Corus' overall cost reporting appears to understate the expenses associated with its sales of hot-rolled steel in the period of review.

Corus maintains it reported its cost data in this review using the same methodologies verified in the investigation and first review and has responded to numerous supplemental questionnaires that establish the validity of its reported cost information.

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[1] In making this comparison, Mittal Steel relies on business proprietary information that is not susceptible to public summary.

Corus also asserts Mittal Steel cannot question the accuracy of its cost data based on a comparison of profit percentages that are different in nature. First, Corus argues, the Department's CEP profit calculation is based on methodologies that do not relate to how average profitability is calculated in the normal course of business. For example, Corus states, the CEP profit calculation excludes home market sales that fail the arm's-length test and includes downstream sales by Corus's affiliates, whose results are not captured in the CSPY income statement. Corus contends the differences between the artificial CEP profit and actual profit ratios do not render Corus' reported costs inaccurate, but rather show one of the biases built into the Department's standard margin calculation methodology that results in inflated margins. Second, Corus claims, as shown in its sales reconciliation and in Mittal Steel's case brief at 11, the CEP profit rate is based on a subset of CSPY's total sales which is not necessarily representative of the whole. Corus argues that not only is this subset a minor portion of CSPY's total sales, but the U.S. portion of these sales, which are all of prime material, are being made at high prices. Corus maintains U.S. price levels are so high that even with "zeroing" the Department computed a preliminary margin of only 2.52 percent. Therefore, Corus contends the fact that the CEP profit rate is greater than CSPY's average profitability across all products and markets does not make Corus' cost reporting questionable. Corus argues this conclusion is more compelling if Corus Staal's profit rate is used as the point of comparison, since total Corus Staal sales revenue is higher than CSPY's and comes from a wider product range. Similarly, Corus maintains, since the volume of sales of subject merchandise is a small subset of the total products sold by CSPY and Corus Staal, one cannot expect the CEP Profit ratio to be representative of total average profitability.

Department's position:

We agree with Corus. Corus has submitted extensive cost responses covering for example, differences in costs of similar products, explanations of the Corus standard cost system. We obtained cost buildups for selected CONNUMs and reviewed the CONNUM buildups to ensure all appropriate costs (i.e., all the elements of COP) were included. From reviewing these numerous responses, we have determined that Corus reported actual weighted-average POR product-specific costs. As to petitioner's argument regarding the difference in profit rates, we do not believe that comparing profit rates is meaningful because product-specific rates will differ from average rates, which include a multitude of products. Therefore, petitioner's finding of a difference in profit rates is neither unusual nor meaningful.

With respect to the comments on the CEP profit calculation, the Department notes, as does Corus, the CEP profit rate calculated in the preliminary results cannot be compared to the profit rates derived from the income statements of Corus Staal BV and CSPY. For example, as Corus indicates, the CEP profit calculation excludes home market sales that fail the arm's-length test and includes downstream sales by CSBV's affiliates, whose results are not captured in the CSPY income statement. The CEP profit calculation used by the Department is a standard calculation and relies on the cost of production data and sales data submitted by Corus. The Department agrees that since the volume of sales of subject merchandise is a small subset of the total products sold by CSPY and Corus Staal, one cannot expect the CEP profit ratio to be representative of total average profitability.

Moreover, as Mittal Steel itself referenced in its brief, the Department typically calculates the CEP profit rate based on the reported expenses where such data are available. Where such data are not available, the Department bases the CEP profit rate on the profits and expenses incurred in relation to

the narrowest category of merchandise which includes the subject merchandise sold in the United States and the exporting country (or sold in all countries when country-specific data are not available). However, in this case the data were available from the submitted responses. Thus, we have made no changes with respect to the CEP profit calculation.

4. Offsetting Dumped Sales with Non-Dumped Sales

Corus claims the Department acted contrary to the statute by using the zeroing methodology in the preliminary results. Corus states the Department compared the price of individual U.S. transactions with the monthly weighted-average NV and when U.S. price was greater than NV, the Department set the resulting negative margin equal to zero for purposes of computing the overall weighted-average dumping margin. Corus contends sales with negative margins were not given their full mathematical effect in the calculation of the overall weighted-average dumping margin and therefore the Department's methodology resulted in a substantially higher dumping margin, cash deposit rate and assessment rate.

According to Corus, both the Court of International Trade (IT) and the U. S. Court of Appeals for the Federal Circuit (Federal Circuit) have found the statute does not require zeroing in either investigations or administrative reviews, citing *Corus Staal BV v. United States*, 259 F. Supp. 2d 1253, 1261 (Ct. Int'l Trade 2003), *aff'd*, 395 F.3d 1343, 1347 (Fed. Cir. 2005), *cert. denied*, 126 S. Ct. 1023 (2006) (Corus I) and *Timken Company v. United States*, 354 F.3d 1334, 1341-42 (Fed. Cir. 2004), *cert. denied, Koyo Seiko Co., Ltd. v. United States*, 125 S. Ct. 412 (Nov. 1, 2004) (Timken), respectively. Further, Corus argues, the CIT has acknowledged that zeroing introduces a statistical bias into the antidumping calculation, citing *Corus I*, 259 F. Supp. 2d at 1263. Despite this, Corus contends the Department has continued to maintain that the statute allows zeroing in administrative reviews, and the courts have found zeroing to be a valid interpretation of the

statute. Corus Case Brief at 5, citing *Timken*, 354 F.3d at 1342-43; *Corus I*, 259 F. Supp 2d at 1264-65; *Corus Staal BV v. United States*, 387 F. Supp. 2d 1291, 1300 (July 19, 2005), *aff'd* 2006 U.S. App. LEXIS 15022 (Fed. Cir. June 13, 2006) (Corus II); and *Corus Staal BV v. United States*, 2006 Ct. Int'l Trade LEXIS 113 at * 8-9 (CIT July 25, 2006) (Corus III).

Corus asserts the Department should find that the statute permits, and U.S. obligations under the WTO Agreement on Antidumping (Antidumping Agreement) require, a different interpretation with respect to zeroing in administrative reviews. Corus argues both the Federal Circuit and the WTO have found the differences between administrative reviews and investigations are irrelevant with respect to zeroing. Corus Case Brief at 5, citing Corus I, at 1347 and United States B Sunset Review of Antidumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan, WT/DS244/ AB/R at (Para.) 135 (WTO App. Body Dec. 15, 2003) (Corrosion-Resistant). Referring to United States—Laws, Regulations and Methodology for Calculating Dumping Margins, WT/DS294/18, Communication by the United States at (Para.) 12 (June 12, 2006), Corus maintains the U.S. Government has reasoned the prohibitions against zeroing are equally applicable to administrative reviews and investigations.

Corus asserts the WTO first found zeroing to be inconsistent with the terms of the Antidumping Agreement in European Communities B Antidumping Duties on Imports of Cotton-Type Bed Linen From India, WT/DS 141/AB/R (WTO App. Body Mar. 1, 2001) (Bed Linen) and later in other determinations involving the United States. More recently, Corus contends the WTO Dispute Settlement Body (DSB) specifically determined in United States B Laws, Regulations and Methodology for Calculating Dumping Margins WT/DS294/R (Panel Rep't Oct. 31, 2005) (Panel Report) that (1) the Department had violated Article 2.4.2 of the Antidumping Agreement in using its zeroing method-

ology in the U.S. antidumping investigation of, inter alia, hot-rolled steel from the Netherlands and (2) the Department's zeroing methodology is a norm which, as such, is inconsistent with Article 2.4.2 of the Antidumping Agreement. Corus Case Brief at 7, citing the Panel Report at (Para.) (Para.) 7.32, 7.105 and 7.106.

Subsequent to the Panel Report, Corus maintains the United States announced a change with regard to its zeroing policy and solicited comments as to the appropriate methodology to use in antidumping investigations. Corus Case Brief at 7-8, citing Antidumping Proceedings: Calculation of the Weighted Average Dumping Margin During an Antidumping Duty Investigation, 71 FR 11189 (March 6, 2006). Corus argues the WTO Appellate Body then found zeroing was not permissible in an average-to-average comparison methodology in investigations. Corus claims the Appellate Body's decision was not limited to investigations, and states the Appellate Body was unequivocal with respect to the impermissibility of zeroing in the antidumping administrative reviews at issue therein. Corus Case Brief at 8, citing United States B Laws, Regulations and Methodology for Calculating Dumping Margins, WT/DS294/AB/R (App. Body Rep't Apr. 18, 2006) (Appellate Body Report) at (Para.) 263.

Corus states the DSB adopted the Panel Report as modified by the Appellate Body Report (collectively, WTO Final Report on Zeroing) on May 9, 2006. Corus holds the United States subsequently entered into an agreement to implement the WTO Final Report on Zeroing findings by April 9, 2007, citing United States—Laws, Regulations and Methodology for Calculating Dumping Margins, Agreement under Article 21.3(b) of the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes, WT/DS294/19 (Aug. 1, 2006).

Citing Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping

Investigation; Final Modification, 71 FR 77722 (December 27, 2006) and Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margins in Antidumping Investigations; Change in Effective Date of Final Modification, 72 FR 1704 (January 16, 2007), Corus asserts that effective January 23, 2007, the Department abandoned the use of zeroing in the context of average-to-average comparisons in investigations. Corus asserts that implementation of the WTO's determination as to the antidumping investigation underlying the order on hot-rolled steel from the Netherlands will result in a negative dumping margin being calculated and the order being revoked. Moreover, Corus contends the same logic relied upon by the Appellate Body to prohibit the use of zeroing in investigations can be applied to administrative reviews. According to Corus, the Appellate Body recently determined that zeroing was inconsistent with WTO obligations "as such" when utilized "in the context of both average-to-average and transaction-to-average calculations in antidumping investigations, antidumping administrative reviews, and new shipper reviews, and found the reliance on zeroed margins in sunset reviews to constitute an as applied' violation of the Antidumping Agreement." Corus Case Brief at 4 and 10, citing United States B Measures Relating to Zeroing and Sunset Reviews, WT/DS322/AB/R at (Para.) & 137, 156, 165 and 185 (Jan. 9, 2007) (United States—Zeroing (2007)).

Based on the foregoing, Corus argues the Department's use of zeroing is unreasonable under U.S. law. Accordingly, Corus urges the Department to modify its practice to eliminate zeroing for these final results.

U.S. Steel responds that contrary to Corus' claim, zeroing is required by the statute while Mittal Steel and Nucor contend that Corus' approach is unreasonable under U.S. law. Both U.S. Steel and Nucor argue that section 777A(d) of the Act sets forth the methodology to be used in calculating

dumping margins. U.S. Steel and Nucor hold that in investigations without targeted dumping, the Department is instructed to use the average-to-average comparison methodology, whereas in investigations with targeted dumping and in administrative reviews, the Department is to use the average-to-transaction comparison methodology. U.S. Steel and Nucor assert that if zeroing is not used, a respondent's dumping margin will always be the same regardless of which methodology is employed, because without zeroing all positive margins are offset by all negative margins under both methodologies. U.S. Steel and Nucor maintain this principle has been acknowledged by the U.S. Government and several WTO Panels, citing, inter alia, Opening Statement of the United States at the First Substantive Meeting of the Panel in United States—Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing"), WT/DS294/R (Mar. 16, 2005) (United States - Zeroing (2006)) at 5, (Para.) 13 and the Panel Report at 142, (Para.) 7.266. U.S. Steel and Nucor claim it would have been pointless for Congress to amend the statute in 1995 to require a specific comparison methodology for each of these three scenarios if both the average-to-average and average-to-transaction comparison methodologies yielded the same result. Citing various Federal Circuit and Supreme Court decisions, U.S. Steel and Nucor argue that the rules of statutory construction require a statute to be interpreted in a manner that prevents any provision of that statute from being rendered meaningless. Therefore, U.S. Steel and Nucor contend, the statute must be construed to give effect to the different methodologies set forth in section 777A(d) of the Act, and the only way to do so is to use zeroing.

Even if zeroing were not required by the statute, U.S. Steel contends, it is definitely a reasonable interpretation of the statute. U.S. Steel and Nucor assert that every U.S. court that has examined this issue has upheld the Department's use of zeroing as a reasonable and allowable interpretation of the

statute, citing, inter alia, Corus I at 1347-49; Timken, at 1334, 1342-43, 1345; Corus II; and Corus III. U.S. Steel maintains the Federal Circuit has found zeroing to be in accordance with the statute in both investigations and administrative reviews, citing Corus I and Timken. U.S. Steel and Nucor claim the Federal Circuit found that WTO decisions are not binding on the United States and cannot override U.S. law, citing Corus I, at 1347-49 and Corus III. U.S. Steel states the Federal Circuit's ruling in Corus I is equally applicable to United States—Zeroing (2007). Nucor argues that Corus does not provide any arguments or information in its case brief that prescribe a different outcome from that reached in every previous instance by the Department and the courts.

U.S. Steel argues that even if the Department had the legal authority to abandon zeroing based on the WTO's decisions, the implementation process is not relevant here. U.S. Steel holds that in United States—Zeroing (2006), the WTO Appellate Body determined that zeroing was inconsistent with the Antidumping Agreement in the context of the 16 administrative reviews challenged by the European Commission, but did not find that zeroing was inconsistent with the Antidumping Agreement "as such" in all administrative reviews. Therefore, U.S. Steel claims, United States—Zeroing (2006) cannot possibly have any bearing on the instant review.

U.S. Steel, Mittal Steel, and Nucor state that under sections 123 and 129 of the Uruguay Round Agreements Act (URAA), the Department must implement any WTO decisions in accordance with the statutory requirements for implementation, which include consultations with Congress. Specifically, Mittal Steel contends that, pursuant to section 129(b)(1)-(4) of the URAA, once a WTO panel or Appellate Body report has been issued, the U.S. Trade Representative (USTR) must consult Congress and the administering authority; the USTR may then ask the Department to issue a

determination within 180 days that would render its action not inconsistent with the WTO report; the USTR must consult again with the Department and the relevant congressional committees; and only then can the USTR direct Commerce to implement the determination. Nucor holds this process has only recently been initiated with respect to the use of zeroing in investigations as per United States—Zeroing (2006), but the Department has not initiated any reconsideration of its zeroing methodology as it pertains to administrative reviews. Regarding United States—Zeroing (2007), which was issued on January 9, 2007, U.S. Steel and Mittal Steel contend that decision is not final since it has not yet been adopted by the WTO DSB and the statutory process for implementation of the Appellate Body's findings has not begun or even been announced yet.

In addition, U.S. Steel and Mittal Steel contend that even if a change were made to U.S. law, it would not apply to the instant review, because under U.S. law adverse WTO dispute settlement decisions are prospective only. U.S. Steel and Mittal Steel maintain that in keeping with section 129(c)(1)(B) of the URAA, WTO decisions apply only to unliquidated entries of subject merchandise that are entered, or withdrawn from warehouse, for consumption on or after the date on which the administering authority is directed to implement that decision. Mittal Steel maintains that since all of the entries subject to the instant review were entered or withdrawn for consumption prior to November 1, 2005, these entries will not be affected by any changes that may be implemented as a result of the 2007 WTO Appellate Body report.

Mittal Steel also contests Corus' assertion that the Department's current methodology does not give sales at fair value their "full mathematical effect." Mittal Steel maintains the Department's current practice is to include fairly-traded imports in the denominator of the dumping margin. If the intent of the Department's dumping margin calculation is to

reduce the harm to the domestic industry that is caused by unfairly-traded imports, Mittal Steel asserts, then fairly-traded imports have been given their full mathematical effect under the Department's current approach. Mittal Steel holds that calculating a dumping margin with offsets only makes mathematical sense if the purpose of the calculation is to determine the economic viability of a foreign producer's foreign exports.

Based on the foregoing, U.S. Steel, Mitttal Steel, and Nucor urge the Department to reject Corus' arguments regarding zeroing and to continue calculating dumping margins without offsetting for non-dumped sales.

Department's Position:

We agree with U. S. Steel, Mittal Steel, and Nucor and have not changed our calculation of the weighted-average dumping margin as suggested by Corus for these final results.

Section 771 (35)(A) of the Act defines "dumping margin" as the "amount by which the normal value exceeds the export price and constructed export price of the subject merchandise." (Emphasis added). Outside the context of antidumping investigations involving average-to-average comparisons, Commerce interprets this statutory definition to mean that a dumping margin exists only when normal value is greater than export or constructed export price. As no dumping margins exist with respect to sales where normal value is equal to or less than export or constructed export price, Commerce will not permit these non-dumped sales to offset the amount of dumping found with respect to other sales. The U.S. Court of Appeals for the Federal Circuit has held that this is a reasonable interpretation of the statute. *Timken Co. v. United States*, 354 F. 3d 1334, 1342 (Fed. Cir.), *cert. denied sub nom., Koyo Seiko Co. v. United States*, 543 U.S. 976 (2004).

The Department notes it has taken action with respect to two WTO dispute settlement reports finding the denial of offsets to be inconsistent with the Antidumping Agreement. With respect to US—Softwood Lumber, consistent with section 129 of the URAA, the United States' implementation of that WTO report affected only the specific administrative determination that was the subject of the WTO dispute: the antidumping duty investigation of softwood lumber from Canada. See 19 U.S.C. 3538.

With respect to United States—Zeroing (2006), Commerce recently modified its calculation of the weighted-average dumping margin when using average-to-average comparisons in antidumping investigations. See Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation; Final Modification, 71 FR 77722 (December 27, 2006). In doing so, Commerce declined to adopt any other modifications concerning any other methodology or type of proceeding, such as administrative reviews. 71 FR at 77724. With respect to the specific administrative reviews at issue in that dispute, the United States has determined that each of those reviews has been superseded by a subsequent administrative review and the challenged reviews are no longer in effect.

As such, the Appellate Body's reports in US - Softwood Lumber and United States—Zeroing (2006) have no bearing on whether the Department's denial of offsets in this administrative determination is consistent with U.S. law. See *Timken*, 354 F. 3d at 1342. Accordingly, the Department will continue in this case to deny offsets to dumping based on export transactions that exceed normal value.

According to Corus, the Appellate Body recently determined that zeroing was inconsistent with WTO obligations "as such" when utilized "in the context of both average-to-average and transaction-to-average calculations in antidumping investigations, antidumping administrative reviews, and

new shipper reviews, and found the reliance on zeroed margins in sunset reviews to constitute an as applied' violation of the Antidumping Agreement." Corus Case Brief at 4 and 10, citing United States - Zeroing 2007 at 137, 156, 165, and 185. Thus, Corus argues the Department's interpretation of the statute is inconsistent with the United State's international obligations and, therefore, unreasonable.

Congress has adopted an explicit statutory scheme for addressing the implementation of WTO dispute settlement reports. See 19 U.S.C. § 3538. As is clear from the discretionary nature of that scheme, Congress did not intend for WTO dispute settlement reports to automatically trump the exercise of the Department's discretion in applying the statute. See 19 U.S.C. § 3538(b)(4) (implementation of WTO reports is discretionary); see also SAA at 354 ("[a]fter considering the views of the Committees and the agencies, the Trade Representative may require the agencies to make a new determination that is not inconsistent' with the panel or Appellate Body recommendations. . .)." Because no change has yet been made with respect to the issue of "zeroing" in administrative reviews, the Department will continue with its current approach to calculating and assessing antidumping duties in this administrative review.

Finally, we note that, as a result of the implementation of the Section 129 determination, the antidumping duty order on hot-rolled steel from the Netherlands has been revoked. In anticipation of Corus questioning the propriety of assessing antidumping dumping duties on these pre-revocation entries, the Department notes that Section 129 of the URAA is clear that any implemented determination resulting from such a proceeding is effective with respect to unliquidated entries that enter or are withdrawn from the warehouse on or after the date that USTR directs the Department to implement the determination. That provision does not speak to the effect of a revocation pursuant to Section 129 on prior unliquidated

entries; however, the SAA makes clear that such entries remain subject to potential duty liability. SAA at 1026

In this instance, the Department is not altering its administrative review determination as a result of the post-POR prospective revocation of the order. The combination of clear statutory language regarding prospective implementation, and the SAA language noting that prior entries may be subject to potential duty liability suggests that Congress clearly anticipated that antidumping duty liability on pre-implementation entries need not be foregone. While the Department lacks sufficient experience with such situations to establish general guidelines, in this instance, the issue is one of pure law that involves different considerations as between investigations and reviews (as reflected in the clear limitation of the Department's December 27, 2006 modification to investigations involving average-to-average comparisons) and, notwithstanding the decision to implement the report, the Department considers that the Appellate Body report represents a substantial departure from the understanding of the Antidumping Agreement at the time it was concluded. For these reasons, the Department declines to consider giving any broader retrospective effect to the revocation of the order.

For the reasons mentioned above, we have not changed our calculation for these final results.

5. Classification of JIT Deliveries as CEP Sales

For the preliminary results, Corus states the Department classified Corus' just-in-time (JIT) sales to one unaffiliated U.S. customer as CEP transactions, based on the fact that Corus' final invoices established the material terms of sale and the final invoices for the JIT sales were issued after the merchandise entered the United States. Corus claims the Department's decision directly contravenes the legal precedent established in the investigation and the first administrative review of this case, both of which were affirmed by

the CIT. Corus Case Brief at 12, n.5 and n.6, citing Corus I, at 1253 and Corus II, at 1291, respectively. Corus argues that during the investigation, the Department found the frame agreements between Corus and its customers were confirmation of a sale or an agreement to sell. Citing Notice of Preliminary Determination of Sales at Less Than Fair Value; Certain Hot-Rolled Carbon Steel Flat Products From the Netherlands, 66 FR 22146, 22149 (May 3, 2001) (Hot-Rolled Preliminary Determination), Corus holds that because its U.S. affiliate, Corus Steel USA Inc. (CSUSA), signed the frame agreements in the United States on behalf of Corus Staal BV, the Department determined the U.S. locus of the frame agreements meant the transactions were CEP transactions. In other words, Corus asserts, the Department found the frame agreements were controlling for determining whether sales were EP or CEP, and invoices were controlling for date of sale. Corus Case Brief at 13, citing Hot-Rolled Preliminary Determination at 22147-48. Since the investigation, Corus claims all final written confirmations of the frame agreements have been executed by Corus in the Netherlands. As a result, Corus contends, in the first administrative review, the Department classified Corus' U.S. sales as EP or CEP sales based on where and by whom the frame agreements were signed. Specifically, Corus asserts the Department classified the transactions as CEP sales when the frame agreements were signed in the United States and as EP sales when the frame agreements were signed outside the United States, citing Certain Hot-Rolled Carbon Steel Flat Products from the Netherlands; Preliminary Results of Antidumping Duty Administrative Review, 68 FR 68341, 68344 (December 8, 2003) (Hot-Rolled First Review Preliminary Results). Corus maintains the CIT upheld the Department in this determination, citing Corus II, at 1297.

According to Corus, there have been no changes in the fact pattern or to the statute since the first administrative review. Therefore, Corus argues, in the instant review the Department

should also determine that where Corus Staal BV concludes the frame agreements for U.S. sales in the Netherlands and acts as the importer of record, the corresponding sales must be classified as EP transactions in accordance with the statute. Citing *Davila-Bardales v. INS*, 27 F. 3d 1, 5 (1st Cir. 1994) (Davila-Bardales) (quoting *Shaw's Supermarkets, Inc. v. NLRB*, 884 F.2d 34, 37 (1st Cir. 1989), Corus contends parties subject to antidumping orders are entitled to have the law applied consistently and to make business decisions accordingly.

Corus asserts the Department misinterpreted the statute in preliminarily determining its JIT sales were misclassified as EP sales. Corus states section 772(a) of the statute defines export price as "the price at which the subject merchandise is first sold (or agreed to be sold) before the date of importation by the producer or exporter of the subject merchandise outside the United States to an unaffiliated purchaser in the United States . . ." (emphasis added by Corus). Corus contends the Department should have considered the event that occurred first, and under the statute the first event can be an agreement to sell. However, Corus argues, in the preliminary results the Department focused solely on the final sale, as embodied in the final invoice to the customer, and in doing so, relied on the criteria used to determine date of sale. Corus maintains the Department has acknowledged the date of sale, on which the material terms of sale are set, can differ from the date on which the terms of sale are first "agreed upon" by the parties, such as in a frame agreement. Corus Case Brief at 16, citing the Final Rule at 27348. Corus claims that by limiting its consideration of the statutory definition of EP to situations satisfying the date of sale criteria, the Department imposed an extra-statutory standard. Further, Corus maintains, by defining "agreed to be sold" in exactly the same way it defines a sale, the Department improperly negated the "agreed to be sold" provision in the statute.

Corus claims that while Congress gave the Department authority to determine "date of sale," the same cannot be said for distinguishing between EP and CEP transactions. Citing *A.K. Steel Corp. v. United States*, 226 F.3d 1361, 1367, 1372 (Fed. Cir. 2000) (AK Steel), Corus contends the Federal Circuit examined whether Congress intended to make a delegation to the Department regarding the definitions of EP and CEP in sections 772(a) and (b) of the statute and found that Congress had not made such a delegation. Corus asserts that "[t]he Department is not free to interpret the statute and introduce its own practice—namely, supplanting the statutory phrase first sold (or agreed to be sold)' with its definition of date of sale.'" Corus Case Brief at 17-18.

In addition, citing *Ishida v. United States*, 59 F.3d 1224, 1230 (Fed. Cir. 1995), Corus argues a fundamental canon of statutory construction requires that an administering body interpret a statute in a manner "that avoids rendering superfluous any provision of a statute." Thus, Corus contends, the Department should have considered the term "first" and the phrase "or agreed to be sold" in the statute. Corus claims that if the Department followed the statute, it should have determined that Corus' JIT sales were EP sales based on the frame agreements, as these clearly evidence an "agreement to sell" "before importation" "outside of the United States." At the very least, Corus asserts the Department should have recognized Corus' issuance of pro forma invoices at the time the merchandise left the Netherlands qualified as an "agreement to sell" prior to importation. As the pro forma invoices are also issued "before importation" and "outside of the United States," Corus claims the Department's classification of its JIT sales as CEP sales was contrary to law.

Corus argues the Department's preliminary results ignored the facts establishing that Corus' JIT sales meet the statutory definition for EP sales. Corus claims the record shows that Corus and its JIT customer entered into a frame agreement

prior to the merchandise being imported into the United States. See Corus case brief at 18. Citing the Preliminary Results at 71523-30, Corus asserts the Department does not dispute the frame agreement is executed outside of the United States and prior to importation. Corus claims the merchandise is first agreed to be sold at the time of the frame agreement, citing Exhibit A-26 of its April 28, 2006 SQR. Corus argues it is irrelevant that the terms established in the frame agreement are subject to change, as it is the possibility of change that allows for the distinction between an agreement for sale and the final date of sale. In addition, Corus argues the pro forma invoices it issues to its U.S. JIT customer prior to export from the Netherlands are evidence of an agreement between Corus and its JIT customer to sell subject merchandise. Without such an agreement, Corus maintains it would not have manufactured and shipped such a large quantity of steel to the JIT customer.

Corus cites the Department's Preliminary Results at 71526, in which the Department found that, due to Corus' resale of merchandise originally destined for the JIT customer to another U.S. customer, Corus' JIT sales did not meet the criteria for EP sales where the first sale to an unaffiliated party occurs before importation. As a result, Corus argues, the Department determined the frame agreement could not govern the sale between the JIT customer and Corus because an order was cancelled after importation and sold to another customer in the United States. Corus Case Brief at 21, citing Preliminary Results at 71526. Corus maintains that just as the Department acknowledges there can be post-date-of-sale corrections, it should find post-agreement corrections are also possible. Corus maintains the Department should not have reclassified all of Corus' JIT deliveries as CEP sales simply because of the single cancelled JIT sale and at most the Department should have reclassified just the single canceled JIT sale as a CEP transaction.

Finally, Corus cites the Hot-Rolled First Review Preliminary Results at 68344, in which the Department referred to the Federal Circuit's finding in AK Steel that the statutory definitions of EP and CEP focused on where the sale takes place and whether the foreign producer or exporter and the U.S. importer are affiliated. In the instant review, Corus contends the Department has ignored the location and identity of the seller as set forth in AK Steel, and instead has focused on when the material terms of sale were set. Corus argues its JIT sales are unlike those at issue in AK Steel, which the Federal Circuit found were between the U.S. affiliate and the unaffiliated U.S. customer. Corus Case Brief at 23, citing *AK Steel*, 226 F.3d at 1372. In contrast to the facts of AK Steel, Corus contends there is no question in the instant review that Corus Staal BV is the "seller" and the entity passing title to the unaffiliated U.S. customer, not Corus Staal's U.S. affiliate. Corus cites AK Steel, at 1370, in which the Federal Circuit stated that "[c]lassification as an EP sale requires that one of the parties to the sale be located outside the United States.'" Corus argues that Corus Staal BV is unquestionably a party to the JIT transactions at issue, whether measured by the frame agreements, pro forma invoices or final invoices and is also clearly located outside the United States. Citing the Preliminary Results at 71526 and its February 9, 2006 section A QR at A-12 and A-23-24, Corus argues that during the POR Corus Staal BV executed all frame agreements and there was no countersignature by the JIT customer; Corus Staal BV issued all pro forma and final invoices; and Corus' U.S. affiliate never took title to the goods.

Based on the foregoing, Corus urges the Department to classify its JIT sales as EP sales for these final results.

Mittal Steel claims the Department's determinations with respect to Corus' JIT sales have been consistent throughout the history of this order. Mittal Steel notes in the investigation, the Department found that CSUSA provided the

final written confirmation to the U.S. customer establishing prices and quantities and therefore the Department concluded the merchandise was "sold (or agreed be to sold)" in the United States. In the first administrative review, Mittal Steel asserts the Department classified sales where the contracts were concluded in the United States as CEP sales.

U.S. Steel, Mittal Steel, and Nucor assert that in the second administrative review, the Department found Corus' JIT sales were clearly CEP sales, citing Certain Hot-Rolled Carbon Steel Flat Products from the Netherlands; Final Results of Antidumping Duty Administrative Review, 70 FR 18366 (April 11, 2005) (Hot-Rolled Second Review) and the accompanying Issues and Decision Memorandum at Comment 2. Mittal Steel argues the Department made this determination based on the fact that "[t]here was no sale between Corus and the JIT customer before importation, because there was no agreement on the material terms (i.e., price and quantity) until the final invoice was issued after importation of the subject merchandise.'" Mittal Steel Rebuttal Brief at 6, quoting Hot-Rolled Second Review and the accompanying Issues and Decision Memorandum at Comment 2. U.S. Steel and Nucor maintain the CIT upheld this finding. Citing Corus III, at 7-14, U.S. Steel and Nucor contend the CIT determined that the sale or agreement to sell for Corus' JIT transactions occurred when the final invoice was issued after importation into the United States, and thus the CIT found the Department had properly classified Corus' JIT sales as CEP transactions. U.S. Steel also asserts the CIT stated "Commerce is free to change its position on frame agreements from the investigation and the previous review because it has fully explained its reasons for doing so.'" See Mittal Steel Rebuttal Brief at 9, n. 28, citing Corus III, at 11 n. 6. Likewise, Nucor argues the Department is always free to modify its methodologies and approaches, even within reviews of the same antidumping duty order, as long as it gives a valid explanation for doing so, citing *Luoyang Bearing Corp. v. United States*, 347 F.

Supp. 2d 1326, 1362 (CIT 2004). U.S. Steel, Mittal Steel, and Nucor contend the Department's determination in the instant review that Corus' JIT sales are properly considered CEP sales is consistent with the second administrative review.

For Corus' JIT sales, U.S. Steel asserts the sale or agreement to sell clearly took place after the goods entered the United States. U.S. Steel holds the phrase "first sold (or agreed to be sold)" as used in the statute does not refer to the first time the buyer and seller come to an agreement, but rather to the first sale to an unaffiliated customer, which could be the actual sale (i.e., the transfer of title and consideration) or the contract between buyer and seller establishing the essential terms of sale and requiring such a sale to take place. U.S. Steel Rebuttal Brief at 8-9, n. 27, citing *AK Steel*, 226 F.3d 1361, 1371.

Similarly, Nucor argues the CIT has found that a "sale" refers to a transfer of ownership and "an agreement to sell" refers to an agreement to transfer ownership of an item. Nucor Rebuttal Brief at 10-11, citing Corus III, 2 at 12-13. Thus, Nucor contends, "an agreement to sell" cannot occur until and unless the material terms overseeing the transfer of ownership are set. Since Corus' frame agreements do not establish the material terms of sale, and those terms are subject to change until invoicing, Nucor argues these frame agreements are best viewed as agreements to agree, and the Department may correctly conclude that no actual agreement to sell occurred until after importation. *Id.* at 11.

Mittal Steel also contends an agreement to certain sales terms without an agreement on price or quantity is not a sale or agreement to sell. Mittal Steel cites Corus III, at 12-13, wherein the CIT held "in order for a sale or agreement to sell to have occurred, the parties must have settled upon the price and quantity involved in the transaction with complete or at least near certainty." Mittal Steel argues that if Corus' framework agreements were considered agreements to sell

pursuant to section 772(a) of the Act, then the price must be the price established at the time of the framework agreement. Mittal Steel asserts the statute precludes any distinctions between the date of sale (i.e., the date on which price and quantity are set) and the date when merchandise is agreed to be sold. Based on Corus' reading of the statute, Mittal Steel claims, a respondent could enter into a framework agreement for several years and no matter when a sale actually took place or at what price, the price of any sale would be that set at the time of the framework agreement. Mittal Steel argues this would mean that actual pricing would be ignored and a respondent could make actual sales for less than fair value as long as it set high prices in a framework agreement. Thus, Mittal Steel asserts, the logic of the statute clarifies that the phrase "agreed to be sold" refers to an agreement which includes actual price and quantity, not Corus' framework agreements.

Nucor contests Corus' argument regarding its pro forma invoices, arguing the CIT did not consider these invoices to be agreements to sell. Nucor Rebuttal Brief at 11-12, citing Corus III. Nucor argues that because Corus' pro forma invoices do not reflect fixed material terms, they are not agreements to sell for purposes of the EP definition. Nucor asserts the cancellation of JIT sales emphasizes the fact that the pro forma invoices could not possibly reflect fixed sales terms, since the actual purchaser was not in the picture yet. Since no sale or agreement to sell was made until after importation, Nucor holds these sales are precluded from EP consideration.

Finally, Mittal Steel maintains the Department's interpretation of "export price" is in line with AK Steel. Citing AK Steel, at 1370, Mittal Steel holds the Federal Circuit found the phrase "outside the United States" in the EP definition refers to the "locus of the transaction," not the locus of the seller. Mittal Steel further cites AK Steel, at 1369, in which the

Federal Circuit stated the "plain meaning of the language enacted by Congress in 1994 focuses on where the sale takes place and whether the foreign producer or exporter and the U.S. importer are affiliated, making these two factors dispositive of the choice between the two classifications." Thus, Mittal Steel asserts, even if a sale takes place between the producer and an unrelated U.S. purchaser, it is a CEP sale if the transaction occurs in the United States. Mittal Steel argues that in the instant review, while the JIT sales may be considered a sale between the producer and an unrelated U.S. purchaser, they clearly have been made in the United States.

Accordingly, U.S. Steel, Mittal Steel and Nucor assert the Department should continue to treat Corus' JIT transactions as CEP sales for these final results.

Department's Position:

The Department had not changed its position with respect to Corus's JIT sales to one unaffiliated U.S. customer. The Department classified such sales in the preliminary results as CEP transactions, based on the fact that Corus' final invoices established the material terms of sale and the final invoices for the JIT sales were issued after the merchandise entered the United States. This is in line with Hot-Rolled Second Review, and the accompanying Issues and Decision Memorandum at Comment 2. In the Hot-Rolled Second Review the Department made its determination based on the fact that "[t]here was no sale between Corus and the JIT customer before importation, because there was no agreement on the material terms (i.e., price and quantity) until the final invoice was issued after importation of the subject merchandise." See Hot-Rolled Second Review and the accompanying Issues and Decision Memorandum at Comment 2.

The CIT upheld this finding. See Corus III, 2006 at 7-14. The CIT determined that the sale or agreement to sell for Corus' JIT transactions occurred when the final invoice was

issued after importation into the United States, and thus the CIT found the Department had properly classified Corus' JIT sales as CEP transactions.

Regarding Corus's allegation that the Department changed its position on this issue, the CIT determined "Commerce is free to change its position on frame agreements from the investigation and the previous review because it has fully explained its reasons for doing so." See *Corus III at 11 n. 6 and Luoyang Bearing Corp. v. United States*, 347 F. Supp. 2d 1326, 1362 (CIT 2004).

Moreover, the Department disagrees with Corus's assertion that the Department classified Corus' JIT deliveries as CEP sales simply because of the single cancelled JIT sale and Corus's suggestion that at most the Department should have reclassified just the single canceled JIT sale as a CEP transaction. Rather, the cancellation of JIT sales emphasizes the fact that neither the pro forma invoices nor the framework agreements could possibly reflect fixed sales terms, since the actual purchaser can change after the importation of the goods. Since no sale or agreement to sell was made until after importation, the Department continues to hold these sales are precluded from EP consideration and were correctly classified by the Department as CEP sales.

6. Duty Absorption

Corus argues the statutory criteria for conducting a duty absorption inquiry were not met and thus the Department acted contrary to law in conducting such an inquiry. Citing section 751(a)(4) of the Act, Corus contends a duty absorption inquiry as to a foreign producer or exporter is allowed only where subject merchandise is sold through an importer affiliated with the foreign producer or exporter. Corus asserts the record shows that Corus Staal BV is both the producer/exporter and the importer of the subject merchandise. Corus claims no U.S. sales of subject merchandise were made

during the POR through an importer affiliated with Corus Staal BV.

Corus cites the Preliminary Results at 71525-26, in which the Department stated it made a duty absorption determination "[b]ecause Corus Staal BV sold to unaffiliated customers in the United States through itself as the importer of record." Corus maintains the Department's justification for conducting a duty absorption inquiry directly contradicts Supreme Court precedent. According to Corus, in *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438 (2002) (Barnhart), the Supreme Court examined whether an entity can be affiliated with itself and found that a "related person" is a separate entity. Corus Case Brief at 26, citing *Barnhart*, 534 U.S. at 456. Corus argues it is therefore not logical for the Department to find that Corus Staal BV, as the producer/exporter, is affiliated with itself as the importer of record, nor was it logical for the CIT to uphold such a finding. *Id.*, citing Corus III.

Corus contends the Department's justification for conducting a duty absorption inquiry is also contrary to section 771(33) of the Act, which defines "affiliated" and "affiliated persons." Corus asserts this provision is consistently written in the plural, meaning there must be two entities in order for affiliation to exist. Addressing subparagraphs (A) through (G) of section 771(33) of the Act, Corus also argues that none of the definitions therein apply to the instant case (e.g., Corus is not a member of a family, officers/directors are not implicated, etc.). Thus, based on section 771(33) of the Act, Corus contends Corus Staal BV as producer/exporter cannot be affiliated with Corus Staal BV as importer.

Corus holds the Federal Circuit has found that duty absorption inquiries can only be made in accordance with the statute, citing *FAG Italia S.p.A. v. United States*, 291 F.3d 806, 818 (Fed. Cir. 2002). Corus claims that Congress has defined duty absorption inquiries as appropriate solely in

situations in which U.S. sales are made through an importer affiliated with a foreign exporter or producer.

Corus argues the Department's duty absorption analysis basically provides that if a respondent is dumping, the respondent also is presumed to be absorbing duties and the burden falls on the respondent to show otherwise. Citing Gray Portland Cement and Clinker From Mexico; Final Results of Antidumping Duty Administrative Review, 65 FR 13943 (March 15, 2000) (Gray Portland Cement) and the accompanying Issues and Decision Memorandum at Comment 26, Corus maintains that to rebut this presumption, a respondent must demonstrate there is an irrevocable agreement between the affiliated importer or producer and the unaffiliated purchaser showing the unaffiliated purchaser will pay the antidumping duties. Corus claims the CIT has previously found this requirement to be commercially unreasonable and likely unenforceable, citing *Fabrique de Fer de Charleroi S.A. v. United States*, 25 CIT 741, 155 F. Supp. 2d 801 (2001) (Fabrique de Fer de Charleroi). Corus argues the Department has found the customer's written promise to pay antidumping duties to be the most persuasive evidence of the passing on of costs, citing Dynamic Random Access Memory Semiconductors of One Megabit or Above From the Republic of Korea: Final Results of Antidumping Duty Administrative Review and Determination Not To Revoke the Order in Part, 64 FR 69694, 69704 (December 14, 1999).

Although a respondent has the opportunity to rebut the presumption that duties are being absorbed, Corus claims the Department has yet to accept the evidence presented by any respondent as satisfactory, citing, among others, Stainless Steel Wire Rod From the Republic of Korea: Preliminary Results of Antidumping Duty Administrative Review, 68 FR 57879 (October 7, 2003) and Gray Portland Cement. Thus, Corus contends, even if the Department's presumption is rebuttable in the abstract, the fact that the Department has

shown the presumption to be de facto irrebuttable for 10 years renders that presumption unlawful.

In addition, Corus argues, the Department has yet to establish any quantitative criteria for conducting duty absorption inquiries. Citing the Final Rule at 27318, Corus asserts that in 1997 the Department noted it would proceed on an ad hoc basis with respect to duty absorption inquiries. Corus claims that up until the present time, the Department has relied merely on whether sales have been made at less than NV as evidence of duty absorption.

Corus argues the statute clearly mandates the Department to do more than simply presume duty absorption is occurring in situations in which there is a dumping margin. According to Corus, the Department's duty absorption standard is unlawful because it does not consistently apply the word "determine" as utilized in sections 751(a)(1) and 751(a)(4) of the Act. Quoting these two provisions, Corus contends the Congress granted the Department authority to determine the amount of antidumping duties due and to determine whether antidumping duties have been absorbed. Citing *Sullivan v. Stroop*, 496 U.S. 478, 484 (1990) (*Sullivan v. Stroop*), Corus argues a pillar of statutory construction is that the same words or phrases in the statute should be given the same meaning. Thus, Corus holds, the word "determine" cannot be interpreted to require a detailed analysis for one provision and an automatic presumption for the other.

Corus asserts the WTO Appellate Body also has analyzed the word "determine" in Article 11.3 of the WTO Antidumping Agreement with respect to the Department's sunset reviews. Citing Corrosion-Resistant at (Para.) (Para.) 114-15 and 178, Corus contends the Appellate Body found the word "determine" required the Department to conduct a more rigorous investigation in sunset reviews and precluded the Department from merely presuming that a likelihood of continued or resumed dumping exists.

Finally, Corus maintains there is no evidence on the record showing that Corus absorbed or did not pass on duties. Rather, Corus argues, the record shows it negotiated terms and prices with its U.S. customers with the intention of passing on dumping duties to those customers. In making this statement, Corus refers to the agreement in its February 9, 2006, submission (duty absorption response) at Exhibit A which, Corus claims, contains "a standard provision protecting Corus should its U.S. price provision decline over time." Corus Case Brief at 33.

U.S. Steel, Mittal Steel, and Nucor respond that the Department properly conducted a duty absorption inquiry and found that Corus was absorbing duties. Mittal Steel and Nucor state the Department conducted a duty absorption inquiry in the second administrative review and that the CIT upheld the Department's duty absorption finding, citing Corus III, at 14-17. U.S. Steel and Nucor argue the CIT specifically has found it proper for the Department to conduct a duty absorption inquiry as to a foreign producer or exporter that also acted as importer of record, citing Agro Dutch Indus., Ltd. v. United States, CIT Slip Op. 06-40 (Mar. 28, 2006).

U.S. Steel, Mittal Steel, and Nucor disagree with Corus' assertion that the Department has established an irrebuttable presumption that duty absorption is occurring where there is dumping. U.S. Steel argues that in Certain Hot-Rolled Carbon Steel Flat Products From Romania: Final Results of Antidumping Duty Administrative Review, 70 FR 34448 (June 14, 2005), the respondent provided evidence rebutting the presumption of duty absorption and the Department made a finding of no duty absorption. Both U.S. Steel and Mittal Steel contend it is appropriate for the Department to shift the burden onto the respondent to show that antidumping duties will be paid fully by the unaffiliated purchaser, because the respondent is the only party to the proceeding able to provide such evidence. Since Corus is the party possessing the

information relevant to duty absorption and has not provided any such information, Mittal Steel holds the Department has presumed reasonably that Corus is absorbing duties. Nucor asserts the Department preliminarily found that Corus sold subject merchandise at dumped prices during the POR and under the Department's long-standing practice it is Corus' responsibility to provide sufficient evidence to rebut the presumption of duty absorption. Nucor argues Corus has not done so and thus the Department has substantial record evidence to find that duty absorption did occur during the POR. Rather than outlining its efforts to devise an enforceable agreement with its customers regarding antidumping liabilities or showing it is commercially unable to enter into such an agreement, Nucor argues, Corus concedes its "contract provisions do not allow for the retroactive collection of any additional antidumping duties ultimately assessed on the subject merchandise.'" Nucor Rebuttal Brief at 16-17, citing Corus' February 9, 2006, QR at 9.

U.S. Steel and Nucor contend the Department's initial presumption of duty absorption is reasonable because the continued existence of dumping shows the producer and its affiliate have not adjusted their prices to curb dumping. In support of this assertion, Nucor cites Gray Portland Cement and the accompanying Issues and Decision Memorandum at Comment 26. Nucor claims the Department's decision in the instant review is consistent with its long-standing practice. Nucor holds that as early as 1997, the Department stated the existence of a dumping margin raises the initial presumption the respondent and its affiliated importer are absorbing duties, citing Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, et al; Final Results of Antidumping Duty Administrative Reviews, 62 FR 54043, 54046 (October 17, 1997). Nucor claims nothing about the Department's duty absorption inquiries is ad hoc, stating that if there is a dumping margin the respondent must produce an enforceable agreement between itself and the first unaffiliated

purchaser in which the latter agrees to pay all dumping duties associated with the sale. U.S. Steel claims the Department appropriately conducts duty absorption inquiries on a case-by-case basis, arguing that in Fabrique de Fer de Charleroi, the CIT found the Department has discretion under the statute to consider the relevant evidence and make duty absorption findings on a case-by-case basis.

U.S. Steel and Mittal Steel refer to Corus' statement in its case brief that the terms and conditions of its U.S. sales contain "a standard provision protecting Corus should its U.S. price provision decline over time." U.S. Steel claims this standard provision cannot be equated with a requirement that the unaffiliated purchaser pay antidumping duties and as such, the record contains no evidence that duties were not absorbed. Mittal Steel contends that it summarized in its February 28, 2006, letter the reasons why the Department should not rely upon this "standard provision" as proof that antidumping duties were not absorbed.

Finally, both Mittal Steel and Nucor respond to Corus' argument regarding the use of the word "determine" in the statute. Mittal Steel argues the Department depends upon respondents to provide information in making both dumping duty and duty absorption determinations, and as part of the instant review it sought information pertinent to both issues. To the extent the Department received information regarding either issue, Mittal Steel claims the Department relied upon that information in making its dumping and duty absorption determinations. Quoting Webster's New College Dictionary (3d ed. 2005) at 315, Nucor asserts the word "determine" means "to decide or settle—authoritatively and conclusively." Nucor contends this definition, and by extension the statute, does not require that the question of duty absorption be resolved by either a massive investigation or a rebutable presumption. Instead, Nucor maintains, Congress only intended for the Department to decide or settle, authori-

tatively and conclusively, whether duties were absorbed. Arguing that Corus' cite to *Sullivan v. Stroop* for the canon of statutory construction is inapposite, Nucor asserts that "determine" is a single word with a vague and broad definition and there are no cross-references for "determine" in the statute that direct the Department to make a "determination" using a certain approach. With respect to Corus' reference to the WTO Appellate Body's analysis of the word "determine," Nucor contends the Appellate Body's opinion is not binding on the Department, has no formal application in U.S. law, and did not even relate to duty absorption inquiries. While the WTO Appellate Body found that a "determination" in a sunset review cannot be based on presumptions or assumptions, Nucor holds, there is nothing in the word's definition that prevents such a finding.

Department's Position:

The Department notes that it conducted a duty absorption inquiry in the second administrative review and that the CIT upheld the Department's duty absorption finding. See Corus III. With respect to Corus's claim that Corus Staal is both the producer and exporter and cannot be affiliated with itself as the importer, the Department noted in the preliminary results that the CIT addressed this issue when it decided "Commerce's interpretation of affiliated' to include exporters importing through themselves has been found to be a permissible construction of the statute." See *Corus Staal BV v. United States*, 2006 Ct. Intl. Trade LEXIS 113 (CIT 2006) at note 10. That decision quoted approvingly *Agro Dutch Indus. v. United States*, 2006 Ct. Intl. Trade LEXIS 41 (CIT 2006):

> Commerce's interpretation of subsection 1675(a)(4) appears to be a reasonable, common-sense solution to what Congress attempted to accomplish with its enactment. This conclusion is inherent from the statute's focus—upon duty absorption in the foreign producer or ex-

porter—and therefore even if the meaning of "affiliate" were clear, and resort to legislative history unnecessary, to find that the statute does not address the circumstance of the foreign producer or exporter itself acting as the importer of record would result in an apparent absurdity.

With respect to the argument that Corus's standard provision protecting Corus "should its U.S. price provision decline over time," the Department disagrees and finds this agreement cannot be equated with a requirement that the unaffiliated purchaser pay antidumping duties. Therefore, the Department finds the record contains no evidence that duties were not absorbed. Because Corus Staal did not rebut the duty absorption presumption with evidence that the unaffiliated purchaser will pay the full duty ultimately assessed on the subject merchandise, we have not changed our preliminarily finding that antidumping duties have been absorbed by Corus Staal on all U.S. sales made through its importer of record, namely Corus Staal.

Finally, with respect to Corus' definition of the word "determine," the Department agrees with Mittal Steel's argument that the Department depends upon respondents to provide information in making both dumping duty and duty absorption determinations. The Department sought information pertinent to both issues, and gave Corus opportunity to rebut the presumption of duty absorption. Corus failed to provide such evidence.

Warranty Expenses

Corus argues the Department erred in the preliminary results by replacing its reported customer-specific warranty expense rates with overall average warranty expense rates for subject hot-rolled steel merchandise in each market. Corus contends the Department provided no explanation for this determination in the preliminary results and seems to have assumed that the overall average warranty expense rates would result in a more accurate margin calculation.

Corus cites the Department's January 3, 2006, questionnaire at pages B-26 and C-30, which asks the respondent to report warranty costs on a model-specific basis, and if this is not practical, to express warranty costs on the most product specific basis possible. Corus contends it does not manufacture or sell hot-rolled steel on a product-specific basis and thus it cannot record warranty expenses on that basis. Citing its February 9, 2006, questionnaire response at A-75-76, Corus asserts it produces hot-rolled steel to customer specifications. As each customer's needs remain relatively constant over time, Corus maintains that customers tend to make repeated purchases of the same or similar specifications. Corus states it therefore computed and reported its home market and U.S. warranty expenses on a customer-specific basis by summing all of the credit notes issued to each U.S. or home market customer during the POR and dividing those totals by the quantity shipped to each customer. Corus asserts that since it manufactures subject hot-rolled steel to order according to customer specifications, its reported customer-specific rates are in fact model-specific. By using overall average warranty expense rates, Corus asserts the Department disregarded the most product-specific basis for calculating warranty expenses.

Corus claims the Department's decision not to use its reported customer-specific warranty expenses conflicts with case precedent, citing Notice of Final Determination of Sales at Less Than Fair Value: Certain Cold-Rolled Carbon Steel Flat Products from Korea, 67 FR 62124 (October 3, 2002) (Cold-Rolled Steel from Korea) and the accompanying Issues and Decision Memorandum at Comment 11 and Grain-Oriented Electrical Steel from Italy: Final Results of Antidumping Administrative Review, 66 FR 14887 (March 14, 2001) (GOES from Italy) and the accompanying Issues and Decision Memorandum at Comment 6. In GOES from Italy, Corus argues, the Department stated, "where the respondent does not record warranty expenses on a model-

specific basis in the normal course of business, the Department allows these expenses to be reported on a customer-specific basis." Corus Case Brief at 37, citing GOES from Italy and the accompanying Issues and Decision Memorandum at Comment 6.

Corus contends the Department has accepted Corus' customer-specific methodology for reporting warranty expenses in the original investigation and each subsequent administrative review. Corus argues the Department accepted its customer-specific warranty expense reporting in both the investigation and the first administrative review following verifications in which it found "no discrepancies" with respect to Corus' U.S. and home market warranty expenses. Corus asserts there have not been any material changes in fact in the instant review that would warrant a change in how its warranty expenses are treated. Without a change in material fact, Corus argues the law dictates that an agency cannot resolve an issue in a contrary manner, citing, among others, *Davila-Bardales*, 27 F.3d at 5 (quoting *Shaw's Supermarkets*, 884 F. 2d at 36); *Hussey Copper, Ltd. v. United States*, 834 F. Supp. 413, 418 (Ct. Int'l Trade 1993); and *Anshan Iron & Steel Co. Ltd. v. United States*, 2003 Ct. Int'l Trade Lexis 109, Slip Op. 2003-83 (2003) at *19-20 (citing *Shikoku Chems. Corp. v. United States*, 795 F. Supp. 417, 421-22 (Ct. Int'l Trade 1992) (Shikoku)).

In addition, Corus states it has used a customer-specific methodology for both the U.S. and home markets. Citing Cold-Rolled Steel from Korea and the accompanying Issues and Decision Memorandum at Comment 11, Corus holds the Department has found that consistency between markets lends support to accepting customer-specific warranty expenses, although such consistency is not the deciding factor.

In conclusion, Corus maintains it relied upon the Department's acceptance of its customer-specific warranty expenses in all prior segments of this proceeding and the Department

has given no explanation for its change in methodology nor has it shown that its explanation is in keeping with law or supported by record evidence. Thus, Corus urges the Department to use its reported customer-specific warranty expense rates for these final results.

U.S. Steel contends Corus has failed to show that its customer-specific warranty expenses are model-specific. In fact, U.S. Steel asserts, Corus' claim that its customer-specific warranty expenses are akin to model-specific rates is contradicted by its own sales data. U.S. Steel maintains the Department's use of average warranty rates in the U.S. and home markets is supported by record evidence and is in accordance with the Department's standard practice. Citing Corus' April 28, 2006, SQR at 55 and 71, U.S. Steel argues that Corus offered the same warranty terms to all home market customers and that warranty terms did not vary from customer to customer in the U.S. market. Where warranty terms do not differ significantly from customer to customer, U.S. Steel claims the Department's practice is to allocate total warranty expenses over total sales in each market. U.S. Steel Rebuttal Brief at 15, citing Honey from Argentina: Final Results, Partial Rescission of Antidumping Duty Administrative Review and Determination Not to Revoke in Part, 71 FR 26333 (May 4, 2006) (Honey from Argentina) and the accompanying Issues and Decision Memorandum at Comment 1.

Mittal Steel argues the Department has a considerable amount of discretion when determining how to allocate warranty expenses, citing *NSK, Ltd. v. Koyo Seiko Co., Ltd.*, 190 F. 3d 1321, 1331 (Fed. Cir. 1999). Pursuant to section 351.401(g)(1) of the Department's regulations, Mittal Steel contends the Department may use allocated expenses when transaction-specific reporting is not feasible and the Department is satisfied that the allocation method does not cause inaccuracies or distortions. Since warranty expenses typically

cannot be reported on a transaction-specific basis, Mittal Steel claims it is necessary to use some method of allocation to account for these expenses. Mittal Steel maintains the Department has opted to apply an average warranty rate to all sales rather than rely on customer-specific warranty expenses, citing Notice of Final Determination of Sales at Less Than Fair Value; Honey From Argentina, 66 FR 50611 (October 4, 200 1) (Honey from Argentina Final Determination) and the accompanying Issues and Decision Memorandum at Comment 15. Mittal Steel contends the Department made that determination in Honey from Argentina Final Determination because it found there were no significant differences between product lines and warranty terms between customers. Mittal Steel Rebuttal Brief at 14-15, citing Honey from Argentina and the accompanying Issues and Decision Memorandum at Comment 1. Citing Corus' April 28, 2006, SQR at 55 and 71, Mittal Steel argues that Corus offers the same warranty terms to all customers in each market and therefore application of an average warranty expense rate to all sales in each market is appropriate.

Mittal Steel asserts that Corus' citations to Cold-Rolled Steel from Korea and GOES from Italy are inapposite. In those cases, Mittal Steel argues, the Department rejected challenges to its decision to use customer-specific warranty expenses since transaction-specific reporting was not feasible and no other alternative for measuring the expenses was presented. However, Mittal Steel claims, in the instant review there is an alternative method for allocating warranty expenses since Corus has provided an overall average warranty expense rate for both markets. Mittal Steel argues the Department has acted within its discretion to use the overall average warranty expense rates because these are less likely to result in inaccuracies and distortions.

Nucor argues that the Department asked Corus to report warranty expenses on a model-specific basis both in the

original questionnaire and in a supplemental questionnaire. However, Nucor asserts, Corus did not report model-specific warranty expenses and did not explain why it was unable to do so. Nucor maintains Corus has not provided any general ledgers that would support Corus' claim that warranty expenses are not recorded on a product level more specific than hot-rolled steel. Nucor contends that even if Corus' ledgers are not kept at this level, there is a mill certificate for each hot-rolled coil as is typical in the steel industry. Thus, Nucor claims, it is likely a warranty claim on a particular sale of subject merchandise could be traced back to the manufacturer and from there Corus could have allocated POR warranty expenses on a product-specific basis. Because Corus neglected to show why it cannot provide warranty expenses in the format requested by the Department, Nucor argues the Department is warranted in using adverse facts available.

Given the alternative of using a customer-specific methodology or an average rate, Nucor claims an average warranty expense rate is more appropriate in this case. Although the Department has accepted customer-specific warranty expenses in certain cases, such as in Cold-Rolled Steel from Korea and GOES from Italy, Nucor argues the Department has chosen to employ average rates over customer-specific rates in certain circumstances, such as in Honey from Argentina. Nucor contends an identical fact pattern exists in the instant review. Citing Corus' April 28, 2006, SQR at 55 and 71, Nucor argues that Corus offers the same warranty terms to all customers in each market. Moreover, Nucor claims, Corus was unable to provide copies of warranty agreements for each customer.

U.S. Steel, Mittal Steel, and Nucor maintain the Department's use of a different methodology from that used in prior segments of this proceeding is not without precedent. U.S. Steel and Nucor cite Honey from Argentina, in which the Department employed a market-wide warranty expense allo-

cation despite accepting the respondent's customer-specific warranty expenses in previous administrative reviews. Mittal Steel holds the Department is not required to follow its interpretation in prior proceedings if there are new arguments or facts upholding a different conclusion, citing *Hoogovens Staal BV v. United States*, 4 F.Supp.2d 1213, 1217 (CIT 1998). Referring to Shikoku, Mittal Steel asserts that while the Court found the Department lacked an adequate basis for changing its practice in Shikuko, Corus offers no support for its claim that it relied on the Department's prior methodology to its detriment. Mittal Steel contends the Department found Shikoku to be inapplicable for this same reason in Honey from Argentina Third Administrative Review. Mittal Rebuttal Brief at 16-17, citing Honey from Argentina.

Based on the foregoing, U.S. Steel, Mittal Steel and Nucor assert the Department properly used overall average warranty rates in the preliminary results and should continue to do so for the final results.

Department's Position:

The Department has determined that it correctly used the overall average warranty rates in the preliminary results and has not changed its position in these final results. In its questionnaires, the Department asked Corus to provide documentation showing how warranty terms differed by customer. In its reply, Corus stated it provided the same warranty terms to all home market customers and that warranty terms do not vary from customer to customer in the U.S. market. See Corus's April 28, 2006, supplemental response at 55 and 71. Therefore, as no significant differences exist between product lines and warranty terms between customers in the market at issue in this review are not distinguishable, the Department finds a market allocation methodology superior under these circumstances. See Honey from Argentina.

Moreover, with respect to the claim that the Department cannot change methodologies from proceeding to proceeding, the Department agrees with Mittal Steel that the Department is not required to follow its interpretation in prior proceedings if there are new arguments or facts supporting a different conclusion. See *Hoogovens Staal BV v. United States*, 4 F.Supp.2d 1213, 1217 (Ct. Int'l Trade 1998).

The Department is authorized to exercise its discretion in the treatment of warranty expenses, provided the interpretation of the statute is reasonable. *NSK Ltd. v. United States*, 190 F.3d 1321, 1331 (Fed. Cir. 1999) (citing *Zenith Elecs Corp. v. United States*, 988 F.2d 1573, 1583-84 (Fed. Cir. 1993)). Accordingly, the Department may formulate and apply improved methodologies based on the facts of a review. See Honey from Argentina.

As stated in Honey from Argentina, the Department recognizes that by their nature warranty expenses are unknown and unforeseeable at the time of sale. As such, in evaluating these types of expenses (i.e., expenses that are inherently unpredictable at the time of sale), the Department tries to account for warranty expenses on a model-specific basis. If Corus had been able to show different warranty terms to different customers, a customer-specific warranty rate may have been acceptable. However, in this case, Corus was unable to show either a basis for either a model-specific warranty or a customer-specific warranty. Therefore, the Department, in line with similar recent cases, is justified in using a market-specific allocation as reported by Corus in its April 28, 2006, response at 55 and 71.

The Department disagrees with Nucor that the Department would be warranted in using adverse facts available because Corus neglected to show why it cannot provide warranty expenses in the format requested by the Department. Corus has claimed it does not sell different models or types of subject hot-rolled merchandise, and there is nothing on the

record of this proceeding that allows the Department to conclude otherwise. Therefore, we find that an adverse application of facts available is not warranted in this specific situation.

8. Clerical Errors

First, Mittal Steel alleges the Department's margin calculation program contains a clerical error that results in the incorrect matching of U.S. sales to normal values. Specifically, Mittal Steel claims the program erroneously compares U.S. control numbers (CONNUMU) to comparison market product codes (PRODCODH) in trying to find identical matches. Mittal Steel argues the Department can fix this error by including the variable comparison market control number (CONNUMH) in the weighted average normal value (NV) database output for the comparison market program and adjusting the margin program to use the CONNUMH rather than PRODCODH.

Corus does not rebut Mittal Steel's argument.

Second, Corus argues in calculating the CEP profit rate, the Department inadvertently neglected to include U.S. indirect selling expenses (ISEs) for EP transactions. Specifically, Corus contends the Department did not incorporate the field INDIRS1U, which includes the ISEs that Corus incurred in the United States, in the CEP profit rate calculation. Corus asserts this mistake artificially increased Corus' CEP profit in the preliminary results, and thus urges the Department to correct this error for the final results.

U.S. Steel, Mittal Steel, and Nucor did not comment on the clerical error.

Department's Position:

We agree that both comments are clerical errors and have corrected both. However, with respect to the first error, we have used use PRODCODH/U as Corus used these fields to

report the product characteristics contained in the Department's questionnaire. With respect to the second error, the programming language suggested by Corus would result in the DINDIRSU being multiplied by INDIRS1U. This would not achieve the desired correction. Instead, the Department has crafted programming language to effect the desired change. See our Final Results calculation memorandum, dated May 15, 2007, for the revised programming.

Agree _____ Disagree _____

_____

David M. Spooner
Assistant Secretary
for Import Administration

_____
Date